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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1141

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, Et Al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Denver and Rio Grande Western Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on December 28, 1966.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law and the Order of Judgment of the District Court, which were not officially reported, appear at pages 132-142 of the record. The opinion of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on December 28, 1966, and is appended hereto as Appendix A, *infra*. The petition of the Denver and Rio Grande Western Railroad Company for rehearing was denied on February 3, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does an award of the National Railroad Adjustment Board, based on the Board's jurisdiction over contract interpretation disputes, fail to confine itself to matters within the Board's jurisdiction, where:

(a) the award requires the carrier to pay each claimant a full day's pay for each claimed violation of the collective bargaining agreement;

(b) there is no contract provision providng for such damages and the Board does not purport to rely upon the contract in awarding such damages;

(c) there is no evidence of an established custom and practice contemplating damages of such a nature; and

(d) there is absolutely no evidence of any actual loss sustained by the individual claimants?

2. Where a district court in an action to enforce an award of the National Railroad Adjustment Board, finds and concludes that:

(a) the requirement of the award that each claimant be paid a full day's pay for each claimed contract violation does not purport to be and is not based upon or supported by the contract in question;

(b) the payments required by the award do not purport to be and are not based upon any established custom and practice; and that

(c) each claimant was fully compensated for all time on duty and thus suffered no actual loss as a result of the claimed contract violations;

may the Court reduce the required payments to a nominal amount or do the 1966 amendments to the Railway Labor Act (Public Law 89-456) prohibit such modification of the award?

3. Did the Court of Appeals err in giving retroactive effect to Public Law 89-456 where:

(a) The provisions of the statute and its legislative history do not indicate any Congressional intention that the enactment should be retroactively effective;

(b) The statute does not deprive the district court of jurisdiction in the type of case pending herein, although the Court of Appeals mistakenly assumed the contrary to be the fact; and

(c) Retroactive application of the statute would deprive petitioner of substantial rights?

4. Does Public Law 89-456 deprive carriers of their common law right to a jury trial in contract disputes where the value in controversy exceeds twenty dollars, contrary to the provisions of the Seventh Amendment to the Constitution of the United States?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are the 1966 amendments to the Railway Labor Act (Public Law 89-456), and Section 3 First (m) and (p) of the Railway Labor Act prior to the 1966 Amendments (49 U.S.C.A. §§ 153 First (m) and (p)). The Seventh Amendment to the Constitution of the United States is also involved. These statutory and constitutional provisions are printed in Appendix B hereto.

STATEMENT

This action was brought by the Brotherhood of Railroad Trainmen against The Denver and Rio Grande Western Railroad Company under § 3 First (p) of the Railway Labor Act to enforce Award 19389 of the National Railroad Adjustment Board, First Division. In addition to the Brotherhood of Railroad Trainmen, eight individuals employed as conductors and brakemen by The Denver and Rio Grande Western were plaintiffs in the District Court, appellants in the Court of Appeals, and are respondents here. The Denver and Rio Grande Western is a common carrier by railroad operating a railroad system which extends from Denver, Colorado, Salt Lake City, and Ogden, Utah.

The dispute which eventuated in Award 19389 concerns the use of head brakemen, who ordinarily ride in the locomotive with the engineer and fireman, to accompany the locomotive a short distance from the point where the train is "yarded" to a designated "tie-up" track. The controversy first arose when the Rio Grande renovated its terminal facilities in the Denver area and established a new yard referred to as the North Yard (R. 75). Prior to these changes, the crews of inbound freight trains had yarded their trains at Burnham Yard in the Denver Terminal and had then accompanied the engine and the caboose to a so-called tie-up track where hostlers and shop employees were available (R. 75). When the North Yard was placed in operation, the Rio Grande issued instructions requiring the head brakeman to accompany the engine, along with the engine crew, from the point where the train was yarded to the designated tie-up track (R. 75). The designated tie-up point was adjacent to the yard office where the head brakeman and other crew members registered off-duty (R. 75). Generally, this service requires only a few

minutes of the head brakeman's time. While he is thus engaged, the head brakeman is under pay and is compensated in accordance with several provisions of the collective bargaining agreement (R. 207-208; 222-223; 232-236; 275-277). Employees represented by the Brotherhood immediately filed claims contending that the "herding" requirement was in violation of the agreement between the parties (R. 82-88). Following negotiations with respect thereto, the Brotherhood and the Rio Grande agreed to submit the claims to a Special Board of Adjustment (R. 88).

The Special Board of Adjustment, created by agreement between the Brotherhood and the Rio Grande, was directed to dispose of the claims submitted to it, including those involving the herding practice at the North Denver Yard. The parties specifically agreed that its awards were to be final and binding (R. 94). On June 23, 1952, the Special Board of Adjustment rendered its award denying the claims. The neutral referee, who rendered the award, held that the practice of the Rio Grande at its North Yard in Denver was proper and in full conformity with the provisions of the agreement. The Rio Grande, which had discontinued the herding practice at Denver while the dispute was pending before the Special Board, reinstated the requirement which had been approved by the Special Board (R. 136). The Brotherhood, however, refused to be bound by the award of the Special Board and immediately commenced filing additional claims with respect to the same practice (R. 64-65). Since the Special Board, established by agreement of the parties, had found the practice to be proper under the existing agreement, the Rio Grande denied the claims.[1] The Brotherhood then submitted the claims to

[1] In the proceedings in the District Court, the Brotherhood conceded that the claims denied by the Special Board of Adjustment and those subsequently filed with the National Railroad Adjustment Board were virtually identical (R. 88, 289-290).

the First Division of the National Railroad Adjustment Board.

The Adjustment Board, which is composed of five carrier members and five labor members, failed to agree on an award, and a Referee was selected to break the deadlock (R. 136). On January 20, 1960, the Referee rendered Award 19389 sustaining the claims (R. 81). A dissenting opinion was filed by the five carrier members of the Adjustment Board and a supporting opinion by the labor members (see R. 129).

Following the rendition of Award 19389, the Rio Grande discontinued the practice of using head brakemen to perform the North Yard "herding" work in question, but refused to pay the claims for an extra day's pay for each alleged violation (R. 136). Instead of filing a statutory enforcement suit, the Brotherhood called a strike to compel the Rio Grande to pay these claims. The District Court granted an injunction against the strike, which was affirmed on appeal. *Denver and Rio Grande Western R.* v. *Brotherhood of Railroad Trainmen,* 185 F. Supp. 369 (D. Colo., 1960), affirmed, 290 F. 2d 266 (10th Cir. 1961), certiorari denied, 366 U.S. 966.

The present lawsuit for enforcement of the monetary aspects of Award 19389 was filed on January 15, 1962 (R. 8). The Rio Grande defended on the grounds that (1) Award 19389 was erroneous and unenforceable because the claims therein sustained had previously been decided adversely to respondents by the final and binding award of the Special Board of Adjustment,[1] and that (2) the allowance of a full day's pay for each alleged violation was improper since the claimants had been fully compensated for

[1] The Special Board was established purusant to Section 3, Second of the Railway Labor Act (45 U.S.C.A. § 153 Second) (R. 92-95).

all time on duty, including the time required to herd engines (R. 13).

The District Court concluded that it should not "substitute its judgment for that of the Neutral Referee's on the substantive issues underlying Award No. 19389" (R. 137). With respect to the allowance of a full day's pay for each claimed violation, however, the Court held that the claimants should only receive nominal damages since the record did not disclose any contractual or evidentiary support for the allowances required by the award (R. 137-140). Accordingly, the District Court awarded the appellants entered judgment for nominal damages although the claimants had been compensated for their "herding" work under other provisions of the collective bargaining agreement (R. 138-140).

The Brotherhood appealed from the judgment below insofar as it awarded only nominal damages of $28,000 (R. 141, 144). The Rio Grande cross-appealed because of the District Court's failure to hold that Award 19389 was barred by the Award of the Special Board of Adjustment (R. 145).

The case was fully briefed, argued and submitted for decision in the Court of Appeals by May 20, 1966. One month later (June 20, 1966) Congress enacted Public Law 89-456, which amended certain provisions of the Railway Labor Act relating to the National Railroad Adjustment Board. With respect to actions to enforce awards of the Board, Sections 3 First (m) and (p) were amended to make all awards of the Board final and binding except for failure of the award "to conform or confine itself to matters within the scope of the division's jurisdiction . . ." (Public Law 89-456 Sec. 2(d)). On July 25, 1966, the Brotherhood sought and obtained leave from the Court of Appeals to file a supplemental brief urging that the amendments to the Railway Labor Act were retroactively applicable to the

judgment previously entered by the District Court. Petitioner was given eleven days to file a reply to this supplemental brief. On December 28, 1966, the Court of Appeals decided that the amendments to the Railway Labor Act should be applied retroactively and, on the basis of its interpretation of the amended statute, reversed the judgment of the District Court. The District Court was not afforded any opportunity to reconsider its decision in the light of the subsequent amendments to the Railway Labor Act. Instead, it was ordered "to enforce the award" (App. A, p. 31).

Although the judgment of the District Court had been entered well over a year prior to the enactment of Public Law 89-456, the Court of Appeals nevertheless concluded that the propriety of that determination must be tested by reference to the amended statute. Moreover, in the process of testing the District Court's judgment by these subsequent developments, the Court of Appeals failed to discuss the significance of the District Court's findings and conclusions under the newly enacted review standards. The Court instead suggested that the amendments to the Act accomplished a "repeal of the district court's jurisdiction to review money awards" (App. A, p. 29). The Court of Appeals apparently concluded, therefore, that the monetary aspects of the award could not be disturbed despite the findings and conclusions of the District Court that the required payments were entirely without contractual or evidentiary support.

The decision of the Court of Appeals concerns fundamental rights of employees and employers under the recent amendments to the Railway Labor Act. As the following discussion will show, the opinion in question clearly reflects a mistaken view of the purpose and effect of these statutory provisions. A determination by this Court of

the important questions of federal law thus raised is urgently needed.

REASONS FOR GRANTING WRIT

(1) The decision of the Court of Appeals completely vitiates the judicial review provided by the 1966 amendments to the Railway Labor Act with respect to awards of the National Railroad Adjustment Board.

One of the crucial issues decided by the Court of Appeals involves the scope of review of awards of the National Railroad Adjustment Board under the terms of the 1966 amendments to the Railway Labor Act. Petitioner urged in its supplemental brief in the Court of Appeals that even if the amendment to the Railway Labor Act enacted subsequent to the submission of the case to that Court should be retroactively applicable, the monetary aspect of the award of the Board did not confine itself to matters within the Board's jurisdiction and was thus properly set aside by the District Court. The statutory provision upon which petitioner relied appears in § 2(d) of Public Law 89-456, providing that an order of the Adjustment Board may be set aside in whole or in part "for failure of the order to conform or confine itself to matters within the scope of the division's jurisdiction" (App. B, p. 34).

Petitioner also cited the legislative history of Public Law 89-456, including the following excerpt from the Report of the Senate Committee regarding the scope of review:

> "The Committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award 'arbitrariness or capriciousness' on the part of the Board. The Committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as

> being arbitrary or capricious. This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputably without foundation in reason or fact, and the committee intends that, under this bill the courts will have that power." (S. Rep. No. 1201, 89th Cong., 2nd Sess. 3 (1966).)

On the basis of these authorities, petitioner contended that the requirement of the award that each claimant be allowed a full day's pay on each occasion of a claimed contract violation was invalid. Particular emphasis was placed on the District Court's findings that the money aspect of the award was not based on any provision of the collective bargaining agreement and was entirely without evidentiary support. It was this aspect of the award which the District Court set aside and for which it substituted an allowance of nominal damages. The Court of Appeals' discussion and disposition of the issue thus raised is as follows:

> "So, too, the Board's determination of the amount of the award is final absent a jurisdictional defect. The measure of damages, like the application of affirmative defenses, offers no jurisdictional question." (App. A, p. 30.)

This cursory dismissal of petitioner's argument makes no reference at all to the basis upon which the District Court reduced the award of damages to a nominal amount and the jurisdictional significance of the findings and conclusions which that Court made to support its action. Petitioner respectfully submits that the award of a full day's pay for each claimed violation which was held by the District Court to be without contractual or factual support, does present jurisdictional questions and that the District Court's resolution of those questions even when considered in the context of the 1966 amendments, was eminently correct.

Basic to this entire discussion is the nature of the jurisdiction of the National Railroad Adjustment Board. Shortly after the Board was created by the 1934 amendments to the Railway Labor Act, this Court emphasized the language of the statute limiting the Board's authority to the resolution of disputes growing out of "the interpretation or application of agreements concerning rates of pay, rules or working conditions" (45 U.S.C.A. § 3, First (i)). *Order of Ry. Conductors of America* v. *Pitney,* 326 U.S. 561; *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U.S. 711, 327 U.S. 661. This is the entire extent of the jurisdiction of the Adjustment Board, as the courts have repeatedly held. Accordingly any award rendered by the Board must be limited to and must be based on the contract rights of the parties. This Court in *United Steelworkers* v. *Enterprise Wheel & Car Corporation,* 363 U.S. 593, described the jurisdiction of arbitrators in contract interpretation disputes and stated the relevant principle as follows:

> ". . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." (363 U.S. 597.)[1]

The significant question, therefore, is whether the monetary aspect of the award of the National Railroad Adjustment Board, which the Brotherhood seeks to enforce, is based on provisions of the collective bargaining agreement. Unless this question can be answered affirmatively, it is

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[1] The arbitrator's jurisdiction was stated in terms of resolving disputes "as to the meaning and application" of the agreement and his award was to be "final and binding" (363 U.S. 594). This phraseology is comparable to that used in the Railway Labor Act.

indisputable that the award does not confine itself to matters within the jurisdiction of the Board.

In seeking an answer to this question, we respectfully suggest that the findings and conclusions of the District Court clearly establish that the award of a day's pay for each claimed violation of the agreement is outside the scope of the Adjustment Board's jurisdiction.

Neither the opinion of the Neutral Referee nor the recitals of the award identify any provisions of the collective bargaining agreement as the basis for awarding a full day's pay to each claimant for each alleged violation of the agreement. There is no suggestion anywhere in the documents evidencing the Board's decision that the agreement between the parties constitutes the basis for the required payments. With respect to this issue, the District Court found that the collective bargaining agreement did not contain such a provision (R. 137-138), and that "The award of a full day's pay is neither authorized by the collective bargaining agreement nor justified by the facts in evidence . . . there is no contractual basis for such an award" (R. 139-140). In *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, this Court emphasized the importance and jurisdictional significance of such findings, stating:

> "The Court of Appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract." (p. 598.)

The District Court made the required findings in the present case and there is no suggestion in the opinion of the Court of Appeals that these findings are erroneous. Consequently, the findings of the District Court fully establish the proposition that the Board's award does not derive its essence

from the collective bargaining agreement and thus does not confine itself to matters within the Board's jurisdiction.

During the proceedings in the District Court, the Brotherhood sought to remedy the absence of contractual support for the monetary award by attempting to establish a custom and practice of paying a full day's pay for each violation of a collective bargaining agreement in the railroad industry and a finding to that effect was requested (R. 122). Referring to the award and the asserted custom and practice, the District Court stated:

> "The Sembower award in the instant case does not make a specific finding of custom, but the Court has been requested to do so by the Brotherhood. There is some evidence before us of a full day's pay having been granted by the carrier for similar violations of the collective bargaining agreement. These settlements differ from the situation at hand in two highly significant respects. First, they involved smaller numbers of claimants, totalling only a fraction of the payments sought under the present award. Also, they were all made prior to Denver and Rio Grande v. Brotherhood of Railroad Trainmen, 185 Supp. 369 (D.Colo. 1960), affirmed, 290 F.2d 266 (10th Cir. 1961), cert. denied, 366 U.S. 966 (1961), which held that an enforcement suit is the exclusive remedy to enforce an Adjustment Board award." (R. 138.)

The District Court found, however, that "the custom of a day's pay has not been established. . ." (R. 139).

Having thus determined that the monetary aspect of the award was not based on the contract between the parties or on any established custom, the District Court then considered the evidence relating to any actual loss suffered by the claimants as a consequence of the alleged violations of the agreement. The evidence on this point clearly established, and the District Court found, that the claimants

had been fully compensated for all time on duty, including the time devoted to herding engines, and thus had suffered no actual loss (R. 140). There was absolutely no evidence of actual loss, either in the record before the Board or in the record before the Court. Accordingly the District Court reduced the amount of the award to nominal damages.

It would seem indisputable that this action by the District Court was eminently sound and in full accord with the scope of review of Adjustment Board awards contemplated by the 1966 amendments to the Railway Labor Act. As to the jurisdictional issue, the precise findings of the Court clearly establish that the monetary aspects of the award are not based on the Board's interpretation or application of the collective bargaining agreement which is the totality of the Board's jurisdiction under the statute. It is equally clear that the monetary aspects of the award are not supported by any evidence before the Board or the District Court. The award is thus within the scope of review described by the Senate Committee in its report on Public Law 89-456. As the Committee emphasized in the excerpt quoted above:

> ". . . a Federal Court would have the power to decline to enforce an award which was actually and indisputably without foundation in reason or fact, and the Committee intends that under this bill, the courts will have that power." (S. Rep. No. 1201, 89th Cong., 2nd Sess. 3 (1966).)

It would be difficult to imagine a more appropriate award for application of the review authority contemplated by Congress.

The invalidity of the monetary aspects of the award of the Board under the 1966 amendments to the Railway Labor Act and the correctness of the District Court's judgment are also established by opinion of the Court of Appeals in *Brotherhood of Railroad Trainmen* v. *Denver and*

Rio Grande Western R. Co., 338 F. 2d 407, 409, 410 (10th Cir. 1964). That proceeding involved a companion award of the Adjustment Board, and the same collective bargaining agreement between the Brotherhood and the Rio Grande. In that case, as in the present case, the award required an allowance of a full day's pay for each claimed violation of the agreement. The District Court reduced the monetary amount to nominal damages and on appeal, the Court affirmed, stating:

> "The collective bargaining agreement contains neither a provision for liquidated damages nor punitive provisions for technical violations. The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act. See Priebe & Sons v. United States, 332 U.S. 407, 413, 68 S.Ct. 123, 92 L.Ed. 32. And if, as counsel for the Brotherhood contends, there exists within the industry a long established and accepted custom to pay what would amount to a windfall for contract violations such as here occurred, such custom was not established by finding, nor requested as a finding, in the procedures before either the Board or the District Court. We conclude that the District Court correctly determined that the instant case is governed by the general law of damages relating to contracts; that one injured by breach of an employment contract is limited to the amount he would have earned under the contract less such sums as he in fact earned. Atlantic Coast Line R. Co. v. Brotherhood of Ry. Clerks, 4 Cir. 210 F. 2d 812, 815; United Protective Workers v. Ford Motor Co., 7 Cir., 223 F. 2d 49, 53-54, 48 A.L.R. 2d 1285. Absent actual loss, recovery is properly limited to nominal damages. Oklahoma Natural Gas Corp. v. Municipal Gas Co., 10 Cir. 113 F. 2d 308; Norwood Lumber Corp. v. McKean, 3 Cir. 153 F.2d 753; 5 Williston, Contracts (rev. ed.) § 1339A."

This, we submit, is a precise holding that the award here involved is not confined to matters within the Board's

jurisdiction, and was properly reduced to nominal damages by the District Court. Even under the 1966 amendment the District Court was fully authorized to modify the award in this manner.

Since the jurisdiction of the National Railroad Adjustment Board is limited to the determination of the rights of the parties to existing agreements (45 U.S.C.A. § 153, First(i)), the Court's action in reducing damages to a nominal amount was clearly based on the conclusion that the award did not confine itself to matters within the Board's jurisdiction. As the Court of Appeals held in the prior case, involving indistinguishable facts, "The Board has no specific power to employ sanctions and such power cannot be inferred as a corollary to the Railway Labor Act" (338 F. 2d 407, 409-410). The judgment rendered by the District Court is thus clearly within the review permitted by Public Law 89-456.

If the monetary aspects of the present award are not subject to the review authorized by the 1966 amendments, it is difficult to attribute any practical significance to the Congressional enactment. What clearer case can there be of an award which does not confine itself to matters within the Board's jurisdiction than the present one which is entirely silent as to the basis, contractual or otherwise, for the allowance of a full day's pay for each claimed violation? If the jurisdiction of the Adjustment Board rests on the contract rights of the parties, it is indisputable that there is not the slightest hint of such contractual rights to support the award of penalty damages in the present case. Moreover the award of a full day's pay, viewed as a compensatory allowance, is entirely without support in the evidence. As the District Court found, the claimants did not suffer any actual loss. The present case, therefore, clearly falls within the intended review described by the

Senate Committee at the time that Congress was considering the proposed amendments to the Railway Labor Act. There is not an iota of evidence to support the award of a full day's pay for each claimed violation.[1]

It is indisputable, therefore, that the Court of Appeals erred in holding that the 1966 amendments prohibit inquiry into the basis for the monetary aspects of the Award here involved. This mistaken view of the statute should be corrected before it gains further currency.

(2) The decision of the Court of Appeals reversing the judgment of the District Court on the basis of the subsequently enacted amendments to the Railway Labor Act is in conflict with decisions from other circuits and is contrary to established principles of statutory construction.

On December 28, 1966, the Court of Appeals held that the validity of the judgment of the District Court, entered on May 6, 1965, should be determined by reference to the amendments to the Railway Labor Act which were enacted into law on June 20, 1966. Although the appeal from the judgment of the District Court had been briefed and argued before the amendments were approved, the Court of Appeals chose to apply standards of judicial review based on its interpretation of the subsequent legislation. This decision is in conflict with decisions of two other Circuits which

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[1] If there is any question about the adequacy or significance of the District Court's findings and conclusions in the context of the 1966 amendments, that Court should be afforded an opportunity to pass on such questions. Surely the District Court is the best source of enlightment as to the meaning and purpose of its findings and conclusions. Before they are found to be inadequate under a statute enacted subsequent to the District Court's consideration of the controversy, some opportunity for reconsideration or explanation should be afforded.

have declined to accord retroactive effect to the 1966 amendments to the Railway Labor Act.

In *Hanson* v. *Chesapeake and Ohio Ry. Co.*, 367 F. 2d 134 (4th Cir. 1966), the Court of Appeals for the Fourth Circuit in a decision dated September 16, 1966, remanded comparable enforcement proceedings to the District Court "to determine the amount of damages to which each of the aggrieved petitioners is entitled" (*Id.* at 136). The Court's action was based on the holding of this Court in *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257 (1965), interpreting the Railway Labor Act prior to the 1966 amendments. Although the 1966 amendments were in effect when the Court of Appeals rendered its decision and had been effective since June 20, 1966, it is clear that the Court considered the *Gunther* decision rather than the 1966 amendments to be controlling as to the scope of review. Similar reliance upon the *Gunther* decision rather than the 1966 amendments is indicated by the decision of the Court of Appeals for the Fifth Circuit in *J. H. Hodges and Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 363 F. 2d 534 (5th Cir. 1966), in an opinion dated July 13, 1966. In remanding to the District Court, the Court of Appeals stated:

> "The District Court has authority under the Railway Labor Act to determine the amount of that award as stated in Sub-division IV of the *Gunther* opinion." (*Id.* at p. 540.)

It is apparent that the Courts in these two pending cases have not given retroactive effect to the 1966 amendments to the Railway Labor Act. Both recognize the right of the District Courts to determine the amount of damages in contrast to the decision of the Court of Appeals that "the jurisdictional foundation for its judgment as to the amount of the award no longer exists" (App. A, p. 29).

The decision of the Court of Appeals is also contrary to the general rule of law and of statutory construction denying retroactive effect to legislative enactments. This Court recently reiterated this firmly established doctrine in *Greene* v. *United States,* 376 U.S. 149, 160, stating:

> "As the Court said in *Union Pac. R. Co.* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 199, 'the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."'"

See also: *Claridge Apartments Company* v. *Comm'r,* 323 U.S. 141; *Hagger* v. *Helvering,* 308 U.S. 389; *Winfree* v. *Northern Pacific Ry. Co.,* 227 U.S. 296; *United States* v. *Burr,* 159 U.S. 78; and *Reynolds* v. *McArthur,* 27 U.S. 417.

Neither in the statutory language nor in the legislative history is there the slightest indication of any intention that the 1966 amendments to the Railway Labor Act should be applied retroactively to invalidate judgments previously entered. Moreover, the retroactive application of the 1966 amendments has resulted in the denial of substantial rights which petitioner had under the pre-existing statute.

At all times during the pendency of this case before the Adjustment Board and in the District Court, the governing law clearly permitted the type of judicial review exercised by the District Court in this proceeding. The Rio Grande relied on the law as it existed, both before the National Railroad Adjustment Board and in the District Court. Substantial expense was incurred and much time was expended in trial of this case and during the appeal to the Court below. All of this has been nullified by the Court of Appeals in reliance on legislation which was enacted more than a year after the District Court had acted.

In an apparent effort to avoid the general rule that statutes should not be applied retroactively, the Court of Appeals referred to an exception which it considered applicable. The exception in question relates to repeal of a statute that confers jurisdiction of a cause upon a court without any reservation as to pending cases. Generally all cases pending when the repeal is accomplished fall with the law. The Court of Appeals relied upon this Court's decision in *Bruner* v. *United States,* 343 U.S. 112, in holding that the facts herein fall within that rule. In the *Bruner* case a civilian government employee sued the United States pursuant to the Tucker Act in a district court for overtime compensation allegedly due for official services. While the case was pending, an amendment to the Judicial Code was enacted which deprived district courts of jurisdiction over such cases. In light of the amendment removing judisdiction completely from the district courts, this Court held that the complaint was correctly dismissed for want of jurisdiction.

This jurisdictional rule, however, is not applicable here. No act was passed that removed the jurisdiction of the district court to hear this case. Under the Railway Labor Act both before and after the 1966 amendments, district courts had and continue to have jurisdiction over actions brought to enforce awards of the Adjustment Board.

The legislative history of the 1966 amendments to the Railway Labor Act (Public Law 89-456) indicates that the purpose of the amendments was to eliminate the right of the carriers to a trial de novo in a suit to enforce an Adjustment Board award (S. Rep. No. 1201, 89th Cong., 2d Sess. (1966)). Congress in eliminating this substantial right of the carriers sought to equalize for both the employees and employers the grounds for judicial review of an Adjustment Board award. In so doing Congress did

not intend to accomplish an elimination of jurisdiction such as that involved in the *Bruner* case. Accordingly, the jurisdictional rule illustrated by the *Bruner* case has no application here. The jurisdictional rule is limited to cases where jurisdiction for the entire cause of action has been removed. This Court clearly intimated as much in the *Bruner* case where it stated:

> "This jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." (343 U.S. 112, 117, fn. 8.)

It is indisputable that the Court of Appeals erroneously applied the jurisdictional rule in according retroactive effect to the 1966 amendments to the Railway Labor Act.

Accordingly, certiorari should be granted in this matter in order to resolve the conflict between the Fourth and Fifth Circuits on the one hand and the Tenth Circuit on the other regarding the retroactive effect of the 1966 amendments to the Railway Labor Act, and to correct the lower court's mistaken application of the decision of this Court in the *Bruner* case.

(3) Public Law 89-456, relied upon by the Court of Appeals in this case, denies to carriers their common law right to a jury trial in a contract dispute where the amount in controversy exceeds twenty dollars and is thus contrary to the Seventh Amendment to the Constitution of the United States.

Prior to the enactment of Public Law 89-456, the Railway Labor Act provided that a money award of the Adjustment Board was not final and binding upon the parties and that a court suit to enforce such awards should proceed in all respects as other civil suits, except that on the trial of such

suit the findings and order of the Adjustment Board would be prima facie evidence of the facts therein stated (45 U.S.C.A. § 153 First (m) and (p), App. B, pp. 35-36). This Court in *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, recognized that while the Adjustment Board's non-money awards are final and binding in all respects the District Court nevertheless has the power to determine the size of a money award ". . . in a lawsuit which can, as the statute provides, proceed on this separable issue 'in all respects as other civil suits' where damages must be determined" (382 U.S. at 265). Thus, the express terms of the Railway Labor Act prior to the 1966 amendments and the *Gunther* decision interpreting the statute preserved the carriers' common law right to a jury trial in contract disputes as protected by the Seventh Amendment. The Seventh Amendment to the Constitution of the United States provides in pertinent part that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

Public Law 89-456 as interpreted by the Court of Appeals now extinguishes this right of the carriers by making all the findings of the Board conclusive, including the size of money awards, with judicial review limited to the issues of whether the Adjustment Board complied with the provisions of the Act, whether the Board acted outside its jurisdiction, or whether there was fraud or corruption on the part of a member of the Board. Public Law 89-456 thus eliminates the carriers' common law right to a jury trial, as guaranteed by the Seventh Amendment and is unconstitutional.

Early in the development of the case law interpreting the Railway Labor Act, the courts recognized that the pro-

visions in the Act for a trial do novo in an enforcement action saved the Act from being unconstitutional. With respect to carrier claims that the Act was unconstitutional in that respect, see: *Cook* v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810, 813 (S.D. Iowa, 1936); *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 244-245 (D.C. Cir. 1941), aff'd by equally divided court (319 U.S. 732).

Insofar as railroad employees are concerned, the legislative history of the Railway Labor Act and the relevant decisions suggest that the employees relinquished this right to a jury trial, with one exception.[1]

While this precise question was not before the Court, *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, does suggest that the employees had voluntarily relinquished the right to a jury trial in wage disputes.[2] In that case the issue before this Court was whether an employee could sue in a federal district court to recover damages for wrongful dis-

---

[1] In *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, it was held that a discharged employee who had not filed a grievance before the Adjustment Board could sue in the courts for a common law remedy of damages. See also: *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653, and *Walker* v. *Southern Railway Co.*, 17 L. Ed. 2d 294. In *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, the Court held that the Adjustment Board has exclusive primary jurisdiction of a wage dispute, thus precluding any prior court action. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, decided the same day as the *Day* case, held that an employee was precluded from bringing a court action after unsuccessful prosecution of a claim for wrongful discharge before the Adjustment Board.

[2] The Court noted that the respondent, who was claiming wrongful discharge, did not argue that a holding that the Railway Labor Act precludes a relitigation of that claim in the courts would deprive him of any constitutional right to a jury trial since, under *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, he could have brought the action originally in a court. 360 U.S. at 607, fn. 6.

missal after denial of his claim by the Adjustment Board. This Court held that the award of the Adjustment Board denying relief was binding upon the employee, thus precluding him from relitigating the same issues in a common law damage suit. In so holding, the Court discussed the legislative history concerning §§ 3 First (m) and (p), (45 U.S.C.A. §§ 153 First (m) and (p)) which allowed a trial de novo in an action to enforce a money award in favor of the employee, but which made a finding by the Adjustment Board against the employee final and binding:

> "The labor spokesman for the proposal made it crystal clear that an essential feature of the proposal was that Board awards on grievances submitted by or on behalf of employees were to be final and binding upon the affected employees. The employees were willing to give up their remedies outside of the statute provided that a workable and binding statutory scheme was established to settle grievances." (360 U.S. at 613.)

There is no evidence, however, that the carriers intended to give up their right to a trial by jury as preserved by the Seventh Amendment to the United States Constitution. The legislative history of Public Law 89-456 indicates that the purpose of the 1966 amendments to the Railway Labor Act was to eliminate the right of the carriers to a trial de novo in an action to enforce an Adjustment Board award. This was not based on any voluntary relinquishment by the carriers of their rights under the Seventh Amendment. Congress sought instead by legislative fiat to establish for both employees and employers identical grounds for judicial review of an Adjustment Board award (S. Rep. No. 1201, 89th Cong., 2d Sess. (1966)).

In *Pennsylvania R. Co.* v. *Day,* 360 U.S. 548, 560-563, Justice Black, in a dissenting opinion, recognized the serious constitutional issue involved in the deprivation of a

jury trial in a wage dispute under the Railway Labor Act, stating:

> "It would surely not be easy to uphold the constitutionality of a procedure which takes away from both parties to a wage dispute their ancient common-law right to a trial by court and jury." (360 U.S. at 561-562.)

This Court's recent decision in *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257, does not discuss the issue of the carriers' right to a jury trial pursuant to the Seventh Amendment in actions to enforce awards of the National Railroad Adjustment Board. The *Gunther* decision, however, preserved the right of the carriers to a jury trial regarding the amount of a money award, and consequently avoided the constitutional issue raised by the 1966 amendments.

We respectfully submit that this Court should resolve the serious constitutional issue raised by the elimination through Public Law 89-456 of the carriers' common law right to a jury trial, as preserved by the Seventh Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 10, 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM, 1966

BROTHERHOOD OF RAILROAD TRAINMEN; A. J. CROSBY; J. W. CROCKER; J. C. DAVIS; F. A. MERRITT; R. P. PARSONS; A. SUBRY; T. A. SPRINGER; and B. L. TRUE,
Appellants,
v.
DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Appellee.
No. 8278

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Cross-Appellant,
v.
BROTHERHOOD OF RAILROAD TRAINMEN; A. J. CROSBY; J. W. CROCKER; J. C. DAVIS; F. A. MERRITT; R. P. PARSONS; A. SUBRY; T. A. SPRINGER; and B. L. TRUE,
Cross-Appellees.
No. 8279

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

James L. Highsaw, Jr. (Philip Hornbein, Jr., Hornbein & Hornbein and Mulholland, Hickey & Lyman, of counsel,

were with him on the brief) for Appellants and Cross-Appellees.

Martin Lucente (Ernest Porter, Kenneth D. Barrows, Walter J. Cummings, Jr., Richard H. Compere and Sidley, Austin, Burgess & Smith, of counsel, on the brief) for Appellee and Cross-Appellant.

Before MURRAH, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

On January 15, 1962 appellants filed in the District Court for the District of Colorado a petition under section 3 First (p) of the Railway Labor Act, 45 U.S.C. § 153 First (p), seeking enforcement of an order of the National Railroad Adjustment Board, First Division. The Board order had granted the sum of $472,000 to the individual appellants, employees of the appellee railroad and members of the appellant Brotherhood, as an award compensating the claimants for services required by the railroad in violation of their collective bargaining agreement. The contract controversy involved the "herding" of locomotives and the award constituted a full day's pay for each claim filed. By its judgment, the district court held that substantial evidence supported the Board's determination that the railroad had violated the terms of its collective bargaining agreement but that the Board had incorrectly determined the proper measure of the allowable award. The district court allowed judgment for nominal damages in the amount of one dollar per day rather than a full day's pay for each incident of contract violation. By appeal and cross appeal the parties assert error in that portion of the judgment that is adverse to their respective interests.

At the time judgment was entered in the district court jurisdiction existed for each facet of the judgment including the reassessment of the amount of the award. 45 U.S.C. § 153 First (m); Gunther v. San Diego & A. E. Ry., 382 U.S. 257. And the case was first submitted to this court in such posture of the governing law. However, on June 20, 1966 the Railway Labor Act was amended by Public Law 89-456, 80 Stat. 208, which provided for severe restraints on the scope of judicial review of awards of the Railroad Adjustment Board.[1]

Prior to the 1966 amendment, section 3 First (m) of the Railway Labor Act read in pertinent part:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. . . ."

This provision was amended by section 2(a) of the 1966 Act by deleting the words "except insofar as they shall contain a money award."

Prior to the 1966 amendment, section 3 First (p) of the Railway Labor Act provided that in suits for enforcement of Adjustment Board awards in the district courts of the United States, ". . . the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated . . ." This language was changed by the 1966 amendment to read as follows:

> ". . . the findings and order of the division of the Adjustment Board shall be conclusive on the parties . . . ."

---

[1] The parties have since filed supplemental briefs.

A new paragraph (q) was added to section 3 First of the Act which gives any aggrieved party the right to petition a district court for review of an Adjustment Board decision and provides that "On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

As we have earlier indicated, this action was pending before us on June 20, 1966, the effective date of Public Law 89-456. It is very clear that the judgment of the district court, regardless of its correctness when entered, must now be given appellate consideration in view of the amendments to the controlling statutes. Carpenter v. Wabash Ry., 309 U.S. 23, 26, 27. See also Hines v. Davidowitz, 312 U.S. 52; American Foundries v. Tri-City Central Trades Council, 257 U.S. 184. And it has specifically been held that the repeal of a law conferring jurisdiction, absent a savings clause for pending cases, destroys jurisdiction in pending cases. Bruner v. United States, 343 U.S. 112. Our case falls squarely within the compulsion of those rules, for with the repeal of the district court's jurisdiction to review money awards the jurisdictional foundation for its judgment as to the amount of the award no longer exists. The judgment in such respect must be set aside, unless, as the appellee railroad contends, the Board order is invalid even within the scope of the amendments or Public Law 89-456 is unconstitutional in inception.

Section 2(d) of Public Law 89-456 provides in part that an order of the Adjustment Board " . . . may not be set aside except for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction . . ." The appellee railroad projects against the amended statute a continuation of two of their original protests to the Board decision and order: refusal of the Board to apply the rule of res judicata or collateral estoppel[2] and the affirmative application of a full day's wage as the measure of damages for each instance of contract violation. We can accord no merit to the claim that, under present limitations on review, the order can or must be set aside. The defenses of res judicata and collateral estoppel are affirmative defenses that, even prior to the amendment, were doubtful subjects of judicial review. See Hodges v. Atlantic Coast Line R. R., 5 Cir., 363 F.2d 534, *interpreting* Gunther v. San Diego & A. E. Ry., 382 U.S. 257. Since review under the cited portion of Public Law 89-456 is now limited "to matters within the scope of the division's jurisdiction," defenses other than jurisdiction defenses are not subject to judicial review by virtue of the specific wording of the statute itself. So, too, the Board's determination of the amount of the award is final absent a jurisdictional defect. The measure of damages, like the application of affirmative defenses, offers no jurisdictional question.

Finally, the railroad contends that Public Law 89-456, by making the findings of the Board conclusive and by refusing review of an order requiring the payment of money damages, is violative of the Seventh Amendment right to trial by jury. We can place no constitutional significance in the statutory amendments as such. The right to a jury in the district court existed before the 1966 amendments and

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[2] An earlier Board decision had upheld the railroad's position concerning the contract duty to "herd" locomotives.

it exists now. The significance of the amendments lies in bounding the already limited scope of judicial review so that the merits of the controversy are in reality a closed question after determination by the Board. Such power in Congress is recognized by the Supreme Court as proper in the field of railway labor law in *Gunther* and reflects the theory that compulsory arbitration of labor disputes must be final, for the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596.

Although the Board's consideration of the issues was prior to the effective date of Public Law 89-456, the amendments do not require any further administrative proceedings. *Cf.* Transportation-Communication Employees Union v. Union Pacific R.R., ... U.S. ...., decided December 5, 1966. Accordingly the case is remanded to the district court with instructions to enforce the award.

APPENDIX B

PUBLIC LAW 89-456
89th CONGRESS, H. R. 706
June 20, 1966

AN ACT

To amend the Railway Labor Act in order to provide for establishment of special adjustment boards upon the request either of representatives of employees or of carriers to resolve disputes otherwise referable to the National Railroad Adjustment Board, and to make all awards of such Board final.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 3, Second, of the Railway Labor Act is amended by adding at the end thereof the following:

"If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the repersentative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of

such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or ap-

pointed shall be compensated and reimbursed for expenses by the Mediation Board. Any ~~two~~ members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petititoner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforceable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

SEC. 2. (a) The second sentence of section 3, First, (m), of the Railway Labor Act is amended by striking out, "except insofar as they shall contain a money award."

(b) Section 3, First, (o), of the Railway Labor Act is amended by adding at the end thereof the following new sentence: "In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination."

(c) The second sentence of section 3, First, (p), of such Act is amended by striking out "shall be prima facie evidence of the facts therein stated" and inserting in lieu thereof "shall be conclusive on the parties."

(d) The last sentence of section 3, First, (p), of such Act is amended by inserting before the period at the end thereof the following: ": *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

(e) Section 3, First, of such Act is further amended by redesignating paragraphs (q) through (w) thereof as paragraphs (r) through (x), respectively, and by

inserting after paragraph (p) the following new paragraph:

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

APPROVED JUNE 20, 1966.

RAILWAY LABOR ACT

(45 U.S.C.A. §§ 153 First (m) and (p) prior to 1966 amendments)

§ *3 First (m)* The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of

the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

* * *

§ *3 First (p)* If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

Seventh Amendment to the Constitution of The United States

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

SUPREME COURT, U. S.
APR 11 1967
JOHN F. DAVIS, CLERK

No. 1141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Petitioner,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.,* *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM, 1966

No. 1141

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *Petitioner,*

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BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court entered on April 19, 1965, are not reported and are reproduced in the record (R. 132-140). The opinion of the Court of Appeals for the

Tenth Circuit, entered on December 28, 1966, has not yet been officially reported and is reproduced in Appendix A to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of respondents, the petition raises the following questions:

1. Did a Federal court, before which a petition was pending on December 28, 1966, to enforce an award of the First Division of the Railroad Adjustment Board in favor of railroad employees pursuant to the provisions of Section 3, First (p), of the Railway Labor Act, as amended, have jurisdiction to enter any order other than an order to enforce such award when the defense of the railroad against such award did not raise any question with respect to the Board's failure to comply with the requirements of the statute, the Board's jurisdiction to render the award, or any claim of fraud or corruption by a member of the Board making the award, but only questions with respect to the merits of said award?

2. Did the Court of Appeals err in concluding that petitioner railroad had not raised any question of the validity of the Adjustment Board award which would entitle the carrier to an order to set aside such award pursuant to the provisions of Section 3, First (p), of the Railway Labor Act, as amended?

3. Has petitioner railroad raised a substantial constitutional issue by its claim that the June 20, 1966,

amendment to the Railway Labor Act (Public Law 89-456), limiting the jurisdiction of Federal courts to set aside awards of the National Railroad Adjustment Board, violates the carrier's right to a trial by jury under the Seventh Amendment to the Federal Constitution, particularly since the railroad waived a jury trial of the petition to enforce the Adjustment Board award involved and voluntarily submitted such petition to a determination by the District Court?

STATUTE INVOLVED

The petition involves the provisions of Section 3, First (i) through (r) of the Railway Labor Act, as amended (45 U.S.C., Section 153, First (i) through (r)), and the Seventh Amendment to the Federal Constitution. These provisions are set forth in Appendix "A" hereto.

STATEMENT

The petition asks this Court to review and set aside a judgment of the United States Court of Appeals for the Tenth Circuit directing the District Court to enforce an award of the First Division of the National Railroad Adjustment Board.

The employee claims which were the subject of the award (No. 19389) were based upon the action of The Denver and Rio Grande Western Railroad Company (D&RGW), in requiring effective August 5, 1952, trainmen on east-bound freight trains terminating at the carrier's North Yard in Denver, Colorado, to herd road engines from inbound trains to the tie-up and service track in said yard (R. 63-64). Prior to that date, road engines on freight trains arriving at the Denver terminal were moved from the inbound track to the

tie-up track for inspection and servicing prior to another trip by road engineers with the herding duties being performed by switchtenders (R. 183, 184, 191, 192, 197, 198). Effective that date, the D&RGW abolished the jobs of switchtenders at the yard and directed that the herding work be performed by the trainmen of the arriving freight trains (R. 63, 64).

The practice in the handling of trains arriving at the North Yard by the road train crews in accordance with the carrier's instructions was that the train would be brought in from the north on one of the yarding tracks, normally Nos. 1 or 2 track, and would proceed on that track until the rear of the train cleared the main line when it would be halted. The head brakeman would then cut the engine from the train and herd the engine onto the tie-up or servicing track. The engine reached the tie-up or service track by moving forward south over cross-over switches to a track to the west of yard tracks Nos. 1 or 2 across Pecos Street as far as the overpass of the Valley Highway. It then backed up and moved onto the tie-up or service track on the west side of the yard (R. 184-187, 193-195, 197-201, 205).

The herding operation required the head brakeman to turn the angle cocks on the train and engine, to proceed ahead of the engine on foot to properly line up seven switches on the cross-overs between the yarding track and the track to the west thereof to which it was necessary for the engine to proceed in order to back onto the tie-up or service track, to flag the crossing at Pecos Street across which it was necessary for the engine to move forward in order to position itself to back onto the tie-up or service track, to again flag the crossing at Pecos Street when the engine began to

back up toward the tie-up or service track, to line up five switches across which the engine was required to move to reach the tie-up or service track, and to accompany the engine until it came to rest on such service track. The engine proceeded entirely on signals from the head brakeman. The head brakeman could then proceed to the yard office to sign off duty (R. 184-187, 193-195, 197-201, 205).

When the train came to a halt on the yard track at the North Yard and the engine was cut, the conductor and rear brakeman were normally in the caboose at the rear of the train. They secured the train and then proceeded to walk to the head of the train. Upon arriving at the head of the train, they would assist in the herding work that remained to be done. Under the rules of the D&RGW, it was the responsibility of the conductor to see that the work was properly done and that the engine was properly put away on the tie-up or service track. The conductor would then proceed with the two brakemen to the yard office and sign off the crew on the train register. This could not be done until the engine was properly placed on the tie-up or service track by reason of Federal regulatory requirements (R. 184, 187, 193-195, 197-201, 205).

The trains arriving at North Yard do not arrive on a set schedule, but arrive at any hour during a 24-hour period (R. 201). The road crews have been on trips away from home on an average of between 20 and 48 hours (R. 187). The road trainmen who have operated trains into North Yard and performed duties in connection with the herding of engines estimate that this work required from 15 minutes to an hour and a half after the engine is cut from the train, depending upon the presence of other rail traffic in the yard to inter-

fere with or delay the herding operation (R. 186, 194, 202, 206).

Since it had long been established that the D&RGW could not require train crews to perform this work in the Denver terminal (R. 65-76) and the carrier had agreed by paying claims of a full day's pay (R. 77-80) for previous violations, the Brotherhood of Railroad Trainmen (BRT) opposed the carrier's action in requiring the trainmen to perform this extra work. The BRT asserted that the herding was outside the scope of work that could properly be assigned such employees under the collective bargaining agreements governing the rates of pay, rules, and working conditions of those employees.[1] The train crews involved (head brakemen, rear brakemen, conductor) then filed claims for a day's pay for each of the days they were required to perform the work involved (R. 64). The claim for a day's pay was based on the provisions of the agreements governing their work[2] providing that employees are entitled to a day's pay for any work performed during eight or *less* hours and the established interpretation and application of such provision in the settling of claims on the property of the D&RGW, including specifically claims of the identical type here involved (R. 77-80).

The claims were processed on the property of the carrier in the usual manner up to and including an

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[1] There are involved two collective bargaining agreements—one governing the work and pay of brakemen and a separate agreement governing the work and pay of conductors (R. 61). The conductors' agreement had been taken over by BRT when it succeeded the Order of Railway Conductors as the duly designated representative under the Railway Labor Act of conductors (R. 62).

[2] Rule 6(a) of the Trainmen's Agreement and Rule 16(a) of the Conductors' Agreement. (See page 804 of Adjustment Board Award.)

appeal to the carrier's Director of Personnel, the chief operating officer of the carrier designated to handle such disputes, in accordance with the requirements of Section 3, First (i), of the Railway Labor Act. On October 24, 1952, the Director denied the claims (R. 65). On December 22, 1952, he again denied the claims in response to a request for reconsideration of the prior ruling (R. 65).

The BRT and the carrier's Director of Personnel agreed that the dispute arising out of the claims would be submitted for determination to the National Railroad Adjustment Board. The claims were so submitted to the First Division of the Board (R. 65).

On January 20, 1960, the First Division of the Adjustment Board issued Award No. 19389, which sustained the claims of the D&RGW employees here involved. This decision was made by Referee John F. Sembower after a deadlock between the carrier members and the employee members of the Adjustment Board (R. 81, 129). The employee members of the Board filed a separate supporting opinion. The carrier members of the Adjustment Board filed a dissenting opinion.[3] The decision of the Neutral Referee and

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[3] Award No. 19389 is reported in Volume 142 of the Printed Reports of the First Division of the National Railroad Adjustment Board, page 858 et seq. Copies thereof were attached to the petition below and were furnished for the convenience of the Court of Appeals but were not reproduced in the printed record because there was included not only the actual decision of the Neutral Referee but the entire lengthy presentation of both the employees and the carrier to the Board (R. 9). The supporting opinion of the employee representatives appears at pages 915-923 of the Award and the dissenting opinion of the carrier representatives appears at pages 908-915.

the supporting and dissenting opinions are attached hereto as Appendix "B".

The Board found that the D&RGW did not have the right under the collective bargaining agreements to require the employees involved to perform the work of herding engines at the North Denver Yard. The Board found that the prior practice of the D&RGW in its Denver terminal with respect to the herding of engines under which other employees were used for the duties involved, and prior decisions of the Board itself and of a Presidential Emergency Board involving the same contract issue, including decisions dealing with the Denver terminal of the D&RGW, created a well-established interpretation and application of the collective bargaining agreements by which the D&RGW did not have the right to require the employees involved to perform the herding work (page 908 of the Award).

The principal claim of the D&RGW before the National Railroad Adjustment Board and subsequently before the Federal courts was that the award was precluded by a decision of Special Board of Adjustment No. 12 set up by agreement between the BRT and the carrier on the property to hear and entertain claims then arising out of the carrier's prior action in 1949 in attempting to require trainmen to herd engines at North Denver Yard (R. 134-136).[4] Referee Jackson, sitting on such Board, had rejected the specific claims before him on the ground that the carrier was authorized to require the work in question under the

[4] See statement of carrier's position at pages 891-903 of the Award and Appendix "B" hereto.

switching rule of the collective bargaining agreement (R. 89-91).

The BRT and the affected employees filed suit in the United States District Court at Denver, Colorado, on January 15, 1962, to enforce Award No. 19389 (R. 1-8). The District Court affirmed the Adjustment Board's interpretation and application of the collective bargaining agreements (R. 137-138, 140). It rejected the contention of the D&RGW that the award, which involved separate claims arising out of the subsequent 1952 carrier action, was precluded by the decision of Special Board of Adjustment No. 12 (R. 137).[5]

However, the District Court reduced the amount of the award to the nominal sum of $1.00 for each employee involved for each day on which the employee had a claim on the ground that under contract principles of damages the employees were entitled only to nominal damages since there was no contractual basis for the award of a full day's pay for each day of the carrier's violation (R. 137-140). The District Court thus disagreed with the BRT and the Adjustment Board's interpretation and application of the collective bargaining agreements involved.

The BRT and the individual employees involved appealed that portion of the judgment of the District

[5] It was clear that the decision of Special Board of Adjustment No. 12 was erroneous since it was based upon the conclusion that the D&RGW could require the work involved under its switching rule while the Director of Labor Relations of the carrier at the trial of the petition to enforce Award No. 19389 categorically stated that he did not regard the herding operation at the North Denver Yard involved as a switching operation (R. 274).

Court reducing the amount of the award (R. 144).[6] The D&RGW cross-appealed the District Court's

[6] The appeal of the BRT, et al., raised the following points:

(a) The cross-appeal of the D&RGW should be dismissed since the United States Supreme Court has recently ruled that the determinations of the National Railroad Adjustment Board with respect to the interpretation and application of collective bargaining agreements is not open to judicial review.

(b) The District Court is not empowered to interpret the meaning and application of the bargaining agreements to the measure of compensation for work performed contrary to determinations of the National Railroad Adjustment Board.

(c) The District Court erred in finding that the collective bargaining agreements did not provide a full day's pay for the extra work which the carrier illegally required employees to perform since there is a clear and unambiguous rule in the agreements defining a day's pay as work of eight hours or less.

(d) The District Court erred in disregarding the established practice of the parties in the interpretation and application of the collective bargaining agreements with respect to the payment of employees for the work here involved upon the grounds that the prior practice involved claims of a small amount and were not voluntary because of strike threats.

(i) The amount of prior settlements of similar claims is irrelevant.

(ii) The issue of duress in the past practice of the parties was not properly before the District Court as it was not raised by the pleadings, the pretrial order, nor by the carrier's proposed findings to the District Court.

(e) The finding of duress is not supported by the evidence which clearly shows that there were no strike threats to induce the prior practice upon which appellants rely.

(f) The District Court erred in finding that the employees had already been paid for the extra work performed. It could do so only by applying Rule 29(c) of the collective bargaining agreement to that work. The record shows that Rule 29(c) was never intended to be applied to such situations and had not in fact at any time been so applied by the carrier.

(g) The District Court erred in finding that it would be inequitable to require the carrier to pay the full amount of the award because such conclusion is not supported by the record and is not a proper legal basis for reducing the amount of the award.

affirmance of the Adjustment Board's interpretation and application of the collective bargaining agreement as not authorizing the carrier to require train crews to perform the work involved (R. 145).

The appeals were argued before the Court of Appeals on May 20, 1966. At the time of the District Court's decision of April 19, 1965, on the petition to enforce Award No. 19389, Section 3, First (m), of the Railway Labor Act provided that awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award". Section 3, First (p), of the statute authorized a suit to enforce an award for non-compliance by the carrier involved, made the findings and order of the Adjustment Board prima facie evidence of the facts therein stated and authorized Federal courts "to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board". Under such statutory provisions, this Court held that Adjustment Board awards are final and binding on employees. *Union Pacific R. Co.* v. *Price,* 360 U.S. 601, 614. This Court also held that such awards are final and binding upon carriers with respect to the interpretation and application of a collective bargaining agreement and are not open to judicial review even though a money award is involved. *Gunther* v. *San Diego & Arizona Eastern Ry. Co.,* 382 U.S. 257 (1965). The Court's statement on this point read as follows: (page 312)

> "Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from serv-

ice is twofold, consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot.

* * * * *

"The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination on the merits of a grievance merely because a part of the Board's award, growing from the Board's determination on the merits, is a money award. The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court."

The District Court had set aside the monetary portion of Adjustment Board Award No. 19389 only by an interpretation and application of the collective bargaining agreement as is clearly shown not only by the decision of the District Court (R. 137-140), but by the statements of the D&RGW in the petition (Pet. 2, 7).

On June 20, 1966, while the litigation was pending before the Court of Appeals, Public Law 89-456 amending Section 3 of the Railway Labor Act became effective. The amended Section 3, First (m), provided that awards of the Adjustment Board "shall be final and binding upon both parties to the dispute". Section 3, First (p), of the statute as amended authorized suits

to enforce orders of the Adjustment Board and limited the jurisdiction of the Federal courts with respect to such suits as follows:

> "The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

Thereafter, the Court of Appeals entertained supplemental briefs from both the BRT, et al., and the D&RGW regarding the effect of these amendments to the Railway Labor Act upon the litigation before it (Appendix A to Pet.).

On December 28, 1966, the Court of Appeals issued its opinion remanding the case to the District Court with instructions to enforce the award (Appendix A to Pet.). This decision was based upon the grounds that the 1966 amendments to the Railway Labor Act eliminated the jurisdiction of the Federal courts to review and set aside awards of the National Railroad Adjustment Board in whole or in part except upon the limited grounds set forth in the amendments. The Court of Appeals also considered and rejected the arguments of the D&RGW that its claims that Award No. 19389 was barred by the decision of Special Board of Adjustment No. 12 raised a defense with respect to the jurisdiction of the Adjustment Board within the

meaning of the amendment to Section 3 First (p), of the Railway Labor Act. The Court of Appeals also considered and rejected the carrier's claim that the amendments to the Railway Labor Act incorporated in Public Law 89-456 violated any carrier right to trial by jury under the Seventh Amendment to the Federal Constitution by reason of the fact that a carrier was denied a trial de novo with respect to an award.

It is this decision of the Court of Appeals to which the petition is directed.

REASONS FOR DENYING THE PETITION

I.

THE PETITION RAISES NO SUBSTANTIAL ISSUE OF FEDERAL LAW WARRANTING REVIEW BY THIS COURT

A. The petition raises no substantial issue with respect to the interpretation and application of a Federal statute

The primary issue in the Court of Appeals decision is the application of Public Law 89-456 to the litigation pending before the Court. This issue does not raise a substantial Federal question warranting review by this Court because (a) while the particular case is important to both petitioner and respondents the impact of the decision is limited since it can apply only to a small number, if any, of suits to enforce Adjustment Board awards pending before Courts of Appeals on June 20, 1966, which have not yet been decided,[7] and (b) the Court of Appeals does not enunciate any new principle of Federal law since the decisions of this Court make clear that where an intervening statutory change, particularly one affecting the jurisdiction of

[7] Public Law 89-456 would obviously apply to any suit involving an Adjustment Board award filed after June 20, 1966, and would also clearly apply to any suit pending in a District Court on that date.

Federal courts, takes place while litigation is pending before Federal courts the amended law is applicable. *United States* v. *The Schooner Peggy,* 1 Cranch (U.S.) 103 (1801); *Carpenter* v. *Wabash Ry. Co.,* 309 U.S. 23 (1940); *Vandenbark* v. *Owens-Illinois Glass Company,* 311 U.S. 538 (1941); *Bruner* v. *United States,* 343 U.S. 112 (1952); *United States* v. *Alabama,* 362 U.S. 602 (1960); *Linkletter* v. *Walker,* 381 U.S. 618 (1965). This is true whether the statutory amendment restricts jurisdiction, as in the *Bruner* case, or confers jurisdiction, as in the *Alabama* case, cited above. In the *Alabama* case, this Court referred to the rule as embracing "familiar principles".

The petitioner argues that the decision is contrary to established principles of statutory construction. It attempts to avoid the many decisions of this Court cited above by stating that the Court of Appeals relied upon the decision in *Bruner* v. *United States,* 343 U.S. 112, and by then arguing that the *Bruner* case is not applicable because it involved a situation in which the intervening statute completely eliminated Federal jurisdiction over the cause of action, while Public Law 89-456 retained Federal court jurisdiction over suits to enforce Adjustment Board awards but simply restricted the subject matter of review in such suits (Pet. 20, 21). However, it is submitted that Public Law 89-456 did restrict the jurisdiction of Federal courts over Adjustment Board awards and is clearly a statutory enactment within the scope of the *Bruner* decision. Prior to the enactment of Public Law 89-456, the Railway Labor Act gave Federal courts jurisdiction to entertain in a trial de novo the merits of an Adjustment Board monetary award and to affirm or set aside the amount of such award. *Gunther* v. *San Diego & Arizona Eastern Ry. Co.,* 382

U.S. 257 (1965). Public Law 89-456 eliminated the jurisdiction of Federal courts to review the merits of an Adjustment Board award in a trial de novo on any issue. The Federal courts are now left with jurisdiction only to consider (1) whether the Board has failed to conform, or confine itself, to matters within the scope of its jurisdiction, (2) whether there has been fraud or corruption, and (3) whether the Board has failed to comply with the requirements of the statute. Thus, the statute has, as in the *Bruner* case, provided no jurisdiction in a Federal court to exercise the type of judicial review of Adjustment Board awards for which the petition contends.

The petition also tacitly recognizes the correctness of the application of Public Law 89-456 to the litigation pending before the Court of Appeals by advancing as its principal reason for the granting of a writ of certiorari the contention that the decision of the Court of Appeals is contrary to that law (Pet. 9-17). The petition argues that the Adjustment Board had jurisdiction to grant the monetary claims of the employees only upon the basis of provisions in the collective bargaining agreement between the BRT and the D&RGW; that the District Court agreed with the carrier's contention that the monetary award in Award No. 19389 was not warranted by any provision of the collective bargaining agreement; that therefore the Adjustment Board had exceeded its jurisdiction in making the monetary award so that the D&RGW objections to such award were properly the subject of judicial review under the provisions of Section 3, First (*p*), of the Railway Labor Act, as amended by Public Law 89-456. On its face, this argument constitutes a strained effort to promote a dispute with respect to the inter-

pretation and application of provisions of the collective bargaining agreement into a jurisdictional issue.

That the true nature of the dispute is simply one concerning the interpretation and application of collective bargaining agreements is clearly shown by the record. The monetary claims were based upon provisions of the collective bargaining agreements covering the trainmen and conductors of the D&RGW, which provide that "8 hours or less . . . shall constitute a day's work" (R. 61, 62), and the contention of the employees that when the D&RGW improperly required the employees to perform the work of herding engines without compensation, it was then required to compensate them for such work in accordance with the cited contract provisions. This position was buttressed by numerous settlements made by the D&RGW over a period of years applying these contract provisions to improper work assignments, including the herding of engines at other terminals (R. 73-80). These claims, which the Adjustment Board sustained, showed that the case before the District Court was thus clearly a dispute not over the jurisdiction of the Board but over its interpretation and application of the collective bargaining agreement.

The petition argues that the Adjustment Board decision was not based on the agreements becaues it did not identify provisions of such agreements as the basis for the monetary award. There was no need for the Board to do any more in this respect than to sustain the claims as presented, which were based upon and did cite the agreements (R. 64-65). The only argument of the D&RGW to the Board with respect to the amount of the award was a mere mention in passing that the matter was governed by switching Rule 15

which the Board rejected. The carrier's case to the Adjustment Board was predicated primarily on a contention that it should not be found in violation of the collective bargaining agreements in ordering the employees to perform the herding work because this issue had been previously settled by Special Board of Adjustment No. 12 in 1949. This is clearly shown by the dissent of the carrier members to the Board's decision attached hereto as Appendix "B", and it was to this contention along with the established practice on the property and other Board decisions on the subject to which the Neutral Referee primarily addressed his opinion.

The fact that the claims did not involve any question of Board jurisdiction is further clearly shown by (a) the stipulation of facts before the District Court showing that the claims were submitted for determination to the Adjustment Board by agreement of the BRT and the D&RGW (R. 65); (b) the D&RGW answer to the enforcement petition in the District Court which failed to assert a contention that the Adjustment Board had no jurisdiction of the employee claims or had exceeded the jurisdiction in rendering the award (R. 9-13); (c) the D&RGW pretrial statement of contested issues of fact and law in the District Court which raised no claim or issue that the Adjustment Board had exceeded its jurisdiction (R. 59); (d) the District Court pretrial order which set forth the issues before it on the enforcement petition which contained no issue with respect to the Adjustment Board jurisdiction (R. 95-97); and (e) finally the decision of the District Court reducing the amount of the award which was based solely upon a disagreement with the position of

the BRT as to the interpretation and application of the collective bargaining agreement and not upon any finding that the Adjustment Board did not have jurisdiction to render the award that it did (R. 136-140). If the position of the D&RGW is correct, then every dispute concerning the interpretation and application of a collective bargaining agreement becomes a jurisdictional issue and the merits of Adjustment Board decisions become subject to judicial review directly contrary to the limitations of Public Law 89-456.[8]

B. The petition does not raise any substantial constitutional issue

The petition also asserts that the writ should be granted because Public Law 89-456 denies to carriers their right to a jury trial under the Seventh Amendment to the Federal Constitution (Pet. 21-25). Assuming *arguendo* that there could be a common law right to jury trial in a statutory suit to enforce an Adjustment Board award, thus giving rise to a right under the Seventh Amendment, no such right could be asserted by the D&RGW in the present case because it waived such right and voluntarily submitted the case to the District Court sitting without a jury (R. 132). The D&RGW is thus in no position to contend that it has been denied any constitutional right and it cannot assert such a right on behalf of carriers generally as

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[8] Significantly, the petition in substance abandons the principal contention which it advanced to both the Adjustment Board and the court, i.e. the claim that its right to require the work involved had been decided by Special Board of Adjustment No. 12 thus precluding the Adjustment Board from deciding otherwise under the rule of *res judicata*. No mention is made in the petition of this contention as a reason for the granting of a writ of certiorari.

it seeks to do in its petition. *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961).

Even if the D&RGW were in a position to make the argument, it is wholly without merit. The decision of the Court of Appeals points out that Public Law 89-456 does not eliminate a jury trial on any issue concerning Adjustment Board awards which may be submitted to a Federal court, but rather limits such issues as may be entertained by the court either sitting with or without a jury (Pet. 30, 31). The D&RGW argument must, therefore, come down to a contention that Congress had no constitutional right to limit judicial review of Adjustment Board awards. It is respectfully submitted that such a contention has no merit in the light of this Court's decisions in *Union Pacific R. Co.* v. *Price*, 360 U.S. 601; *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548; *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257; *Transportation-Communication Employees Union* v. *Union Pacific R. Co.*, — U.S. —, 17 L. Ed. 2d 264, decided December 5, 1966. These decisions emphasize the final and binding character of Adjustment Board awards. In addition, the decision in this *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11, aff'd 331 F. 2d 1020, *cert. den.* 377 U.S. 918, case sustained the validity of the establishment under Public Law 88-108 of an arbitration board to render final and binding decisions subject to limited court review of Section 6 Railway Labor Act contract disputes between employees and carriers.

II.

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH ANY OTHER COURT OF APPEALS DECISION OR WITH DECISIONS OF THIS COURT

The petition argues that the decision of the Court of Appeals conflicts with a decision of the Fourth Circuit in *Hanson* v. *Chesapeake and Ohio Ry. Co.*, 367 F. 2d 134, and with a decision of the Fifth Circuit in *Hodges and Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 363 F. 2d 534 (Pet. 18-19). In each of these cases, the Court of Appeals involved, citing *Gunther* v. *San Diego & Arizona Eastern Ry. Co.*, 382 U.S. 257, reversed a judgment of a district court granting summary judgment to a railroad in a suit to enforce an Adjustment Board award and remanded the case to the district court for the determination of the amount due the employees.[9]

Both of these decisions were rendered after the passage of Public Law 89-456 on June 20, 1966. The petition argues that the decisions are in conflict with the decision of the 10th Circuit here involved because the Fourth and Fifth Circuits did not apply the 1966 amendments to Section 3 of the Railway Labor Act embodied in Public Law 89-456 in the two decisions.

However, neither the Fourth Circuit in the *Hanson* case nor the Fifth Circuit in the *Hodges* case gave any consideration to the effect of Public Law 89-456 on the

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[9] In the *Hodges* case, the BRT and the Atlantic Coast Line Railway Company reached an agreement on the disposition of the claim involved following the Fifth Circuit decision and such agreement was incorporated in a judgment of the District Court, entered on March 17, 1967. The *Hanson* case is still pending.

appeals before them and did not make any findings with respect to this point. The decisions thus clearly indicate that the issue of the impact of Public Law 89-456 upon pending litigation to enforce Adjustment Board awards was not raised before either the Fourth Circuit or the Fifth Circuit in the cited cases. This is confirmed by a review of the records of those cases. Counsel for the BRT has confirmed the accuracy of this fact through counsel for the employees in each case. Nor is there even any indication that either the Fourth Circuit or the Fifth Circuit was aware of the passage of Public Law 89-456 when the cited decisions were rendered.

Under these circumstances, the *Hanson* and *Hodges* decisions cannot properly be said to conflict with the decision of the Court of Appeals in the present case.

CONCLUSION

Upon the basis of the foregoing considerations, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

STATUTE INVOLVED

I. Section 3, First (i) through (r) of Railway Labor Act (45 U.S.C., Section 153, First (i) through (r)):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such disputes must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee

within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such

order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for re-

view of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

2. *Seventh Amendment to Constitution of the United States:*

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

APPENDIX "B"

Award No. 19389 of First Division of National Railroad Adjustment Board and Supporting and Dissenting Opinions

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Virtually identical issues involving these parties, arising at the same point on carrier's system, have been passed upon numerous times heretofore by the parties themselves in voluntary settlements of claims between them, by this Division, by an Emergency Board, and by a Special Board on the property.

This Division sustained the claim in Award 9357, without the aid of a Referee. In that docket there was singular recognition by the carrier that the claim was valid. A bulletin issued July 18, 1928, directing trainmen upon arrival at Burnham Terminal to cut the engine off the train, was withdrawn November 12, 1929; a new bulletin was posted November 17, 1930, and withdrawn December 11, 1930, with carrier's representative explaining that it "... should not have been issued"; instructions issued to trainmen in July, 1934, were withdrawn after a claim was filed, carrier's representative writing: "I am sorry that the original instructions put out some two or three years ago were overlooked and that this movement was again started. The practice was discontinued about August 20th or immediately after the cases came to my attention and I feel it will not again occur."

In almost the last paragraph of its submission therein, carrier said with candor: "It is true, however, that it had not been the practice for brakemen to take their engine to the cinder pit track on arrival, and when it became

known that a portion of General Order No. 46 provided for the brakeman to take their engine from Burnham Yard to the cinder pit track that portion was cancelled and the practice was discontinued effective August 26, 1937." Accordingly, this Division ruled unanimously: "By virtue of certain commitments in evidence on the part of representatives of respondent carrier it is held that claim asserted herein is valid."

However, a new claim arose subsequently, and in Case No. 20 of the Emergency Board it was sustained in 1946, the award reciting, "account brakeman required to herd engine from Round House to Depot Yard at Pueblo . . . Articles 9 (b), 71 of Trainmen's Schedule . . .".

Then, in Award 14631, with Referee Paul N. Guthrie assisting this Division on July 13, 1951, sustained another like claim, saying:

> "Petitioner contends that work performed by Brakeman Morgan violated the provisions of Article 9(b) of the relevant schedule wherein it is provided, in the absence of specific rules covering work performed in terminals, that customary practices will govern and shall not be extended. Facts of record, and not directly and specifically challenged by respondent, indicate that the work performed in the instant situation exceeded the practices followed in that terminal handling similar work. Therefore, a sustaining award is justified."

In that docket there again appears evidence of two settlements on the property sustaining similar claims, and this Division always attaches special significance to the interpretation the parties themselves may place upon the meaning of provisions in their own agreement.

However, Special Adjustment Board No. 12 on the property, denied a claim on June 23, 1952, and carrier naturally

relies heavily upon this, pointing out the serious consideration that a different ruling in the instant case might penalize it even though it was in compliance with an award of an authorized tribunal and was operating in accordance with such award. Nevertheless, it is inescapable that prior to the Special Board's decision there was unusual unanimity of precedent with respect to these same parties on the same issue at virtually the same point on the road.

In a statement elaborating upon the Special Board's award, the neutral member granted that a different result had been reached in settlements by the parties, an Emergency Board, and twice by this Division, but stated that "notwithstanding these facts, the carrier finally came to the conclusion that this interpretation was erroneous." It is an unfortunate concomitant, of course, of repeated submissions of the same issue that some inconsistency in interpretation may arise, and it is precisely this situation which impels this Division to follow the most consistent discernable course.

It may be that the Special Board was led to its conclusion by not having the advantage of availability of the full dockets before the Emergency Board, and this Division in connection with its Awards 9357 and 14631, because its award states that before those bodies "the derivation of Article 9 (b), its history and background as presented to this (Special) Board were not discussed;" whereas, specific reference thereto is made both in the award of this Division in 14631 and in Emergency Board Case No. 20.

Carrier also relies upon the agreement of the parties which withdrew Docket 26570 from the First Division and established the Special Board on March 24, 1952 providing that, "Such awards shall be final and binding upon both parties to the dispute." Important as consistency is, it must be observed, however, that unless they are grouped, each claim must be approached individually as an *ad hoc*

matter, and that the awards are indeed final and binding as to them, but not to all subsequent claims even of like nature. No formal doctrine of *stare decisis* ever evolved, even in the common law system of the Anglo-American courts, has become that rigid.

Along that same vein, however, it is to be noted that the instant docket reveals final handling on the property on December 22, 1952, after the Special Board had concluded its work, and bears the signed stipulation of the parties: "It was agreed in final conference December 20, 1952 this case would be submitted to N.R.A.B., First Division, or Special Board of Adjustment", so that even if a submission agreement were needed to present this question again, it would certainly be properly before this Division, and we must sustain the claim in view of all the foregoing.

AWARD: Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION
ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 20th day of January 1960.

DISSENT OF CARRIER MEMBERS

Originally this dispute, with which we are here concerned, came into existence on August 21, 1949. On that date the Carrier put into service a new yard at Denver, Colorado, designated as the North Yard. Thereafter, all trains arriving Denver from Bond and Phippsburg terminated in this yard. The inbound road crew, after pulling into the yard, were required to dispose of their engine on a designated "tie-up track" located in the immediate vicinity of the east end of the yard. The handling of the engine, from the train to the tie-up track, is the matter

here in dispute. It was contended that the head brakeman, he being the only member of the train crew involved, was required to perform herder service in thus disposing of his engine. However, claims, for an additional day's pay, were advanced in favor of the Conductor and both Brakemen.

The above claims were denied by the Carrier, and were subsequently submitted to this Division (Docket 26570). Thereafter the Brotherhood of Railroad Trainmen petitioned the Carrier to establish a special system Board of Adjustment to handle this dispute and a large number of other pending disputes. The Carrier acceded to this request resulting in Special Board of Adjustment No. 12. In establishing this special Board, the parties entered into an agreement providing that the Board was created "for the purpose of disposing of pending time claims and grievances", and, it was also agreed that the awards of the Board would be "final and binding upon both parties to the *dispute*".

The dispute in Docket 26570, which was presented to and decided by Special Board of Adjustment No. 12, contained three contentions:

(1) A protest of the instructions issued by the Superintendent designating the two "tie-up tracks" and directing the employes that road engines would be placed on either of these two tracks. (Circular #425).

(2) A total of thirty specific claims for dates from Sept. 14, 1949 to and including Oct. 18, 1949.

(3) A further claim reading: "This appeal will cover all claims of crews on subsequent dates for a day's pay when head brakeman is required to herd engine from inbound train to service track in North Yard, Denver."

On June 23, 1952, Special Board of Adjustment No. 12 rendered a denial award* covering this dispute.

The present dispute (Docket 30812, Award 19389) is, and was recognized by this Referee to be, identical to that contained in Docket 26570, which was denied by Special Board No. 12. The fact that the present case contains six specific claims for dates in August 1952, subsequent to the award of the special Board, cannot change the nature of the dispute and should not have been used as an excuse to breath new life into an identical dispute, between the same parties, submitted by them to a Board of competent jurisdiction and disposed of by that Board. The matter was "res adjudicata", and, consequently, the present case should have been dismissed.

As before stated, this claim should have been dismissed. In failing to do so, this Referee committed a grievious error. Furthermore, in sustaining this claim, on its merits, equally serious errors are clearly apparent.

The Petitioner, in support of this claim, relies upon Article 9 (b) of the applicable agreement, reading:

"ARBITRARIES AND SPECIAL ALLOWANCES

"(b) Where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended."

However, in the same applicable agreement, there is in effect a rule covering work performed at terminals, Article 15, reading:

"TERMINAL SWITCHING

"Trainmen in local or through and irregular pool freight service required to do terminal switching be-

* This award appears in Docket 30812 as Carrier's Exhibit C, and, consequently, will not become a part of this Division's printed award. Therefore, the award is attached to and made a part of this dissent.

fore departure or after arrival at terminals, will be paid for the actual time so used at pro rata rates on the minute basis.

"If road overtime computed from the time reporting for duty until final release produces the greater compensation, terminal time under this rule shall not apply and road overtime will be paid."

The petitioner contends that the placing of the engine on the "tie-up track" was work that should have been performed by herders. If that contention is correct, then the matter falls squarely under the provisions of Article 15. That rule does not support the claim for an additional day's pay. To the contrary, Article 15 provides pay for the actual time consumed on the minute basis and only under circumstances where road overtime is not involved. Referee Jackson, sitting on Special Board of Adjustment No. 12, recognized that petitioner's claim was not supported by the applicable rules, and, consequently, denied the claim. The present Referee apparently did not think that rules of the applicable agreement merited any consideration. It will be noted that his Findings make no attempt to interpret them.

Prior to May 1, 1945, the terminal switching rule (Article 15) was only applicable at certain specified points. It did not apply to Denver, the locale of the present claim. In the agreement of May 1, 1945, and in the subsequent agreement of February 1, 1952, the presently effective agreement, this rule was expanded to include all terminals, thereby making it applicable at Denver.

The awards relied upon by this Referee are all concerned with claims arising prior to May 1, 1945, and involved terminals, including Denver, which were not, at that time, covered by the terminal switching rule. Likewise, the disputes that were disposed of by the Carrier during the years of 1929, 1930, 1934, and 1937, quite obviously covered

matters arising prior to May 1, 1945. It is plainly evident, from the Findings, that the sustaining award here is based on these awards and settlement.

Referee Jackson, sitting on Special Board No. 12, recognized that there had been a significant and controlling change in the applicable agreements that demanded a denial award of the present dispute. However, Referee Sembower, in this award has conveniently ignored this important and controlling change in the effective agreement, between these parties, which was entered into on May 1, 1945. This is indeed strange, since Award 19372, Referee Sembower, B of R T vs D & R G W, contains the following statements in regard to this same agreement of May 1, 1945:

> "Prior to the agreement of May 1, 1945, Article 64 of the said agreement between the parties provided: 'In establishing new runs the proper general officer will notify the General Chairman of the Brotherhood of Railroad Trainmen and negotiate rates and conditions to cover the service. This rule not to prevent the railroad taking care of the demands of the service.'
>
> "A significant change was made May 1, 1945, so that the Article now provides: 'The Company is not prohibited by any Article or provision of this Agreement from establishing new runs, or new assignments.' Thus it is clear that the carrier had the authority to establish the new run herein.
>
> "However, in negotiating for a change in the said Article, the carrier on December 8, 1943, proposed also that language be included as follows: '. . . or from discontinuing or rearranging old assignments.' This was not incorporated in the revised Article, which in this respect remains unchanged.
>
> "The Division often has stated that to ask for a rule change is one of the best ways to indicate in the

party's own estimation that it is needed to supply the authority to do what the proposed language covers."

In that case he held that, since the Carrier did not obtain the desired change in the rules, the claim must be sustained. In the present case the Carrier did obtain the desired change. However, in this case that significant change is ignored, since, if it had been considered, this claim could not have been sustained.

The Findings and Award are so obviously erroneous that they cannot be permitted to pass unchallenged. Therefore, we dissent.

H. V. Bordwell

The undersigned concur:

E. T. Horsley
Geo. H. Dugan
H. W. Burtness
H. J. Reeser

APPENDIX TO DISSENT AWARD 19389

Award — Special Board of Adjustment No. 12
(Docket 26570)

In Case No. 26570 (withdrawn from the First Division), as a result of a merger of the Denver and Salt Lake Ry Company into the reorganized D & R G W, there was a coordination of facilities, operations and services, affecting among other things, yardmasters, switchmen, engine and train service employes entitled to work in the then separate terminals of Denver-Burnham (D&RGW) and Denver-Utah Junction (D&SL). Prior to August 21, 1949, the Carrier built a new yard (the north Yard) south of the old D&SL Denver-Utah Junction yard, and effective as of that date all trains departing for or arriving from the west were to depart from or arrive at the North Yard and upon arrival head brakemen were to place their engines

on the tie-up tracks. Inasmuch as this had not been the practice in the old Denver-Burnham yard, or in the old Denver-Utah Junction yard, claims were filed by train crews.

The basic issue in these twelve cases involves the interpretation of Article 9 (b) of the May 1, 1945 agreement (not applicable to conductors after June 1, 1950). Article 9 (b) has been in effect on this property since December 1, 1919. It should be noted here that all claims arose after May 1, 1945.

* * * * *

Shortly prior to December 1, 1919, the Director General of Railroads issued a memorandum under date of November 15, 1919, in which he stated as follows:

> "It seems to me that the best way to accomplish the giving of reasonable additional compensation to the employees in this slower freight service . . . is on the one hand to allow time and one half for over time, and on the other hand to cut out in all freight service all special arbitraries and allowances of every character, including initial terminal delays and final terminal delays. . . .
>
> "I am therefore willing to establish December 1, 1919, the time and one-half for overtime in road freight service provided the train and engine men will accept such a basis in lieu of all special allowances and arbitraries of every character and will do this for the railroads as a whole."

Apparently the train and enginemen engaged in road freight service would not accept the basis stated by the Director General inasmuch as the final rule, to be effective December 1, 1919, appeared as follows (Article X of Supplement No. 25 to General Order No. 27):

> "ARTICLE X — ARBITRARIES AND SPECIAL ALLOWANCES
>
> "(a) Excepting payments under rules applying to work performed at initial and final terminals, and to

final terminal delays, all arbitraries and special allowances applying to road service other than passenger, under rules, regulations, or practices, which conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip shall be eliminated.

"On roads where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended.

"(b) Where the special payments under the rules, regulations, or practices which are retained under Section (a) have been allowed independently or separately from the trip, they will continue to be so allowed, but at the former rates."

Article X has been embodied verbatim under the heading "Arbitraries and Special Allowances" in all of the agreements (including the December 1, 1919 agreement) between the Carrier and the Brotherhood except that the second paragraph of Sub-Division (a), above, was marked in the agreement Sub-Division (b) and Sub-Division (b) above, was marked in the agreement Subdivision (c).

The Brotherhood argues that Article 9 (b) is general in its application and that in any case where an employe's duties are extended the rule is violated and the employes become entitled to an extra day's pay, citing in support of its position several awards of the First Division as well as the recommendations in some of the cases handled by the Emergency Board of July 10, 1946. The Carrier argues that the entire article must be read together and that when so read, Article 9 (b) is not applicable to the cases in Group 8 inasmuch as there is a rule (Article 15) applying to work performed at terminals. It points out that in Awards 1 to 10 of the First Division, employes at Ogden,

Grand Junction and Salida terminals were involved and that the switching rule* did not apply at these terminals at the time the claims there involved arose.

Article X of Supplement No. 25 to General Order No. 27 was enacted to provide greater compensation to certain train service employes in freight service by giving them time and one-half as overtime in exchange for the elimination of certain arbitraries and special allowances. While it is true that Supplement No. 25 did not purport to destroy—and never could have been supposed to have destroyed—seniority rights by authorizing the substitution of road men for yardmen, it is also true that Article X had no bearing upon—nor was it intended to affect—the duties normally and usually performed by brakemen.

It seems to us that the proper construction of Article X is that the second paragraph of subdivision (a) thereof would be applicable only on roads where there existed no rules applying to work performed at terminals. Article 15 of the May 1, 1945 agreement was in effect at the time these claims arose. That is a rule applying to work performed at initial and final terminals. Therefore, subdivision (b) of Article 9 of the Agreement does not apply.

Our conclusion is buttressed by the fact that on many properties where there were rules applying to work performed at terminals, some carriers and organizations

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* NOTE: Rules applying to work performed by freight crews at initial and final terminals have been in effect on this property at least since the 1908 agreement. But prior to May 1, 1945, special rates for switching were limited: In the 1908 agreement, to the El Moro, Trinidad, Minturn, Gunnison, La Veta and Chama Terminals; in the 1919 and 1926 agreements to the terminals previously mentioned, plus Ouray, Santa Fe, Green River, Helper and Soldier Summit; in the 1940 agreement to the same terminals, except that Bond was substituted for El Moro.)

agreed to eliminate the rules for freight road employes covering arbitraries and special allowances, made provision for the time and one-half referred to in Article X, and never included in the agreements the actual wording of Article X (a). This is true on this property with regard to the enginemen's and current conductors' agreements.

In support of their claims, the employes cited Awards 9357 and 14631 of the First Division, N R A B, and certain findings and recommendations of the Emergency Board of July 10, 1946. However, it appears from reading these awards, as well as the record in the Emergency Board proceedings that the derivation of Article 9 (b), its history and background as presented to this Board were not discussed.

Finally, it is to be noted that all these claims are for an extra day's pay. And yet the caption of the Article upon which the claims are based is entitled "Arbitraries and Special Allowanees." Certainly it cannot be argued that a claim for an extra day's pay is a claim for either an arbitrary or a special allowance.

Article 15 is a rule applying to work performed at initial and final terminals. As previously stated, it was in effect when these claims arose. We find that Article 9 (b) is not applicable to any of these cases. Since the Brotherhood places its chief reliance on that Article, our award is that these claims be denied.

SUPPORTING OPINION

The dissent charges the majority with error in sustaining the claim, giving reasons which are easily demonstrable as contrary to the weight of authority on this Division, with reference to each of them.

The record submitted shows that from prior to 1919, train crews were not required to render the service subject of claim—the accompanying of the road engine to the desig-

nated tie up track in Denver terminal, upon completion of the road trip. Numerous settlements by the parties, of which the respondent Carrier was one, repeatedly recognized this practice and the application of Article 9(b) to it. Article 9(b) contains this language:

> "Where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended."

This is a standard provision, the meaning of which is well understood in the industry. The dissent appears to reflect a belief by the dissenters, that if any rule is in effect at terminals, Article 9(b) is not applicable. If so, this is in error. The rule means that where a given kind of work is to be done at terminals and there is no specific rule covering it, the prevailing practice as of the effective date of the rule (January 1, 1919) will control and it will not be extended. In this case, the practice was to not require train crews to render the service subject of claim and, under the rule, the work could not be exacted of the men without negotiation and agreement.

The agreement which was in effect on this carrier as of January 1, 1919, did contain rules pertaining to certain work performed at terminals. Article 27 provided that trainmen would not be required to couple air hose or test air at terminals where car men were employed. Article 29 provided for payment of terminal delay to passenger crews. Paragraph (a) of Article 9 itself, had reference to payments "under rules applying to work performed at initial and final terminals" and Article 15 covered "Switching performed by freight crews" at the terminals listed. Article 21 limited payment for "Terminal delays, switching and other arbitraries" to the extent set forth. Article 46 dealt with the responsibility of trainmen in seeing that their cabooses were properly equipped but relieved them

of the work of placing the supplies thereon. Article 51 relieved trainmen of going "under cars to adjust slack or piston travel, or to perform the duties of car men at points where car men are maintainded." It further provided: "At terminals where car men are employed they will close car doors" which meant that trainmen were relieved of that work at terminals. Other rules dealing with the work or duties to be performed at terminals are Article 55, 57, 60, 62, 63, 65 and 76.

None of the rules negotiated by this carrier specifically covered the work of accompanying engines at terminals. From this we find the parties with a contract containing 14 Articles dealing with work to be performed at terminals and the service of accompanying engines, under Article 9(b), to be continued in keeping with the practice in effect as of January 1, 1919.

Next, the record contained substantial probative evidence of agreement between the parties that the practice was to not require train crews to handle road engines to the designated tie up track upon arrival at Denver terminal. In view of the unrealistic nature of the dissent and its bland disregard for this evidence, a brief summary of it is in order:

Award No. 9357 involves these same parties and the performance of the identical work at Denver.

The submission of the employes in that case reflects that the trainmen were not required to render the service prior to July 18, 1928; that the carrier then extended their assignments to include it, in violation of Article 9(b) and claims were made. It is shown that after claims were filed and protest made, the instructions were cancelled and the claims withdrawn, November 13, 1929. A bulletin was again posted by the carrier November 17, 1930, exacting the work of the trainmen "to avoid delay in the break-up of trains arriving Burnham if the hostlers are not on hand to take charge of engine".

The employes protested this violation also, and on its being taken up on December 11, 1930, with the carrier, its Assistant General Manager R. F. Ray, stated: "Bulletin instructions of November 17th should not have been issued." The bulletin was not taken down and the matter was handled further. Under date of October 5, 1931, Mr. Ray acknowledged the impropriety of the work requirement and concluded by saying:

> "* * * If, however, it is your intention to hold me to my statement to Mr. Day the bulletin will be withdrawn."

Again, in July, 1934, the carrier imposed the work upon road trainmen in Denver; time claims were filed and on November 22, 1934, Assistant General Manager Ray said, in part:

> "ANSWER: I am sorry that the original instructions put out some two or three years ago were overlooked and that this movement was again started. The practice was discontinued about August 20th or immediately after the cases came to my attention and I feel it will not again occur. However, there is no basis under the rules for the claim for an additional day's pay which is therefore denied."

The next violation of the agreement occurred starting August 17, 1937, and this time the employes refused to be satisfied with cancellation of the instructions; they insisted that the claims be paid, progressing them to the First Division. The time claims were sustained in our Award No. 9357, without Referee assistance.

The next disposition shown in the record is that of Case No. 20, of Emergency Board Report dated August 14, 1946, in which the carrier was advised to allow the claim involved, quoted as follows:

"Your letter of July 5, File 555/6, appealing the following case to this office:

'Claim of Conductor D. W. Edgar, Brakemen M. N. Taylor and C. H. Shacklett for one day's pay each date April 25 and May 2, 1946, account brakeman required to herd engine from Round House to Depot Yard at Pueblo when called for a Soldier Train. Articles 9 (b), 71 of Trainmen's Schedule and Articles 2 and 3 of Switchmen's Schedule.'

"Claim will be allowed."

The employes reproduce material from Award No. 9524, T v D&RGW, decided without Referee assistance. It is there shown that prior to August 20, 1937, "crews assigned between Denver and Bond originated and terminated at Seventh Street Yard"; that on August 17, 1937, the carrier posted its General Order No. 46, reading, in pertinent part:

"Freight trains departing for and arriving from D. & S. L. will originate and terminate at Burnham Yard instead of 7th Street, Denver.

"Freight trains arriving from D. & S.L. will use C. & S. back lead from switch between 12th and 13th Streets to Burnham, this switch being controlled from Tower 'A' Denver Union Terminal. It will be necessary for trains using this track to obtain register check on first class trains between Denver and Burnham.

"Trains arriving from D. & S.L. will be stopped at 7th Street Yard, when necessary, for switch engine to remove Denver business, after which trains will proceed to Burnham."

In 1937 we find the carrier making a change of yards in Denver, where these road crews would begin and end their trips. Note that it was not then contended that this constituted establishing a new "terminal"; that it was recog-

nized for what it was—designating a new yard in which to tie up in an existing terminal—Denver being the terminal proper and the various yards being units of it. In the case at hand, the carrier tells us that placing the North Yard in operation was the equivalent of creating a new terminal, where prior practices were not to be honored. The unrealistic nature of that argument is attested to by the handling of the change of yards from Seventh Street Yard to Burnham Yard in August, 1937.

We have had a number of disputes submitted to us on the question of whether all yards within a terminal are a part of that terminal—i.e., that a terminal as such comprises all of the yards and facilities within its limits. A very recent award in point is No. 18851, C v CRI&P. In brief to the Referee, the Carrier Members said (page 5 thereof):

> "In Award No. 14944, CT v CMStP&P, we dealt with a road train crew's claim for an additional day's pay. In yarding their train at Mitchell, S.D., they operated over the main track of another seniority district. The Respondent asserted that '* * * the entire movement is within yard limits * * *.' Referee D. R. Douglass denied the claim, because:
>
> > '* * * the entire terminal may be used by employes from more than one seniority district. There is no agreement which would prevent these claimants from using any of the tracks within this terminal.'
>
> "In Award No. 15183, T v IC, road crews claimed an additional day's pay, contending they were required to 'go off their seniority district.' At their terminal, they yarded their train in a yard on another seniority district. The Respondent contended that '* * * a crew is not used outside its assigned limits when used on the tracks of another district within the station or switching limits of a point located on their own senior-

ity district.' Referee Coffey upheld the Respondent's position, and denied the claims, because:

'Petitioner's complaint is that the local crews were run off their seniority district when required to go to North Jackson instead of originating and terminating at a different point in the Jackson terminal known as "West Yard".

'It appearing that North Jackson and West Jackson are parts of the same terminal and all tracks traversed being within the terminal limits, the facts of record and schedule of rules do not uphold the claim.'

"See also Awards Nos. 15293, 16560, and 16937, of like import."

Referee Sembower denied the claim and in his findings, said:

"As a conductor with seniority on the Des Moines Valley seniority district, the claimant had the right to handle the train in question through Altoona. Altoona is a station which is common territory for conductors of both seniority districts involved, and we have held that where an entire terminal is used by employes from more than one seniority district, in the absence of any agreement to the contrary, there is nothing to prevent employes from using any of the tracks within such a terminal. Awards 14944, 15183. Accordingly, this claim must be denied."

Reverting to Award No. 9524: the submission of the carrier shows that the change in yards in August of 1937 was the same as that accomplished with the opening of the North Yard in 1949:

"Prior to June 15, 1934, the Rio Grande operated trains in its mainline service only between Denver and

Pueblo and beyond Pueblo. Effective June 15, 1934, mainline operations were inaugurated between Denver and Bond and beyond Bond over the joint line with the Denver and Salt Lake Railroad. This new mainline service resulted in a material decrease in the mainline mileage for business between Denver and points west of Grand Junction to Salt Lake and beyond to California. The opening of the new cut-off line resulted in an increase in thru business, also the diversion of some business from the old main line through Pueblo, necessitating enlargement of terminal yard facilities at Denver. When service via the joint line was started June 15, 1934, enlargement of the Yard at Burnham had not been completed.

"During the initial period of the new operation from June 15 to August 20, 1937, freight trains departing from and arriving at Denver over the D. & S. L. joint line were made up and departed from or were received in the downtown or 7th Street Yard. Effective August 20, 1937, with completion of additional yard facilities at Burnham and as provided in General Order 46, which reads as follows; freight trains arriving at and departing from Denver via the joint line originated and terminated at the Burnham Yard, passing by 7th Street Yard enroute out of or into the Denver terminal."

At page 9 of the pamphlet copy, the carrier recites a history of similar operational changes at Salt Lake City:

"Similarly at Salt Lake City, for many years the 6th South Street or downtown yard was the point at which all road trains east and west between Salt Lake and Helper or Soldier Summit were assembled or yarded. With increase of thru traffic, particularly coal from the vicinity of Helper, Utah, it became necessary to provide additional yard tracks at that point and

they were located at Roper, some 2.8 miles east of the 6th South Street yard."

This much serves to establish the fact that the engine handling subject of claim was never part of the terminal work of the train crews at Denver, whether the carrier designated 7th Street Yard, Burnham Yard or North Yard as the tie up yard. Also, that each time the carrier ventured to make it a part of their work, the action was protested, claims were filed and the carrier acknowledged the impropriety of its conduct.

The carrier alleges that an agreement entered into at the time the North Yard was placed in operation, accepted it as a new "terminal"; that prior to the issuance of Bulletin Number 151, a conference was held with the Local Chairmen at which the parties thoroughly discussed the method of handling trains there and no protest was made "to any provision of Bulletin Number 151."

In the first place, as pointed out by the petitioner, any understanding or agreement having the effect of interpreting or applying rules of the agreement must be handled in accordance with Article 91—with the General Chairmen, and not with the Local Chairmen. In the second place, an agreement with reference to switching limits, which is the subject of the understanding actually reached with the Local Chairmen, has no bearing on the amount or nature of the work to be done at North Yard, under Article 9(b). In the third place, the argument of the carrier that there were no practices in effect at Denver in so far as the North Yard was concerned, when that yard was placed in operation, is nonsense. We have already seen how two Prior changes were made in the tie up yards at Denver itself and at Salt Lake, without any such position being taken by the carrier. It is furthermore, a simple matter of fact, that the work involved remained constant—the tieing up of trains in Denver Terminal as a whole; that when the

same work was transferred from 7th Street Yard to Burnham Yard in 1937 and from Burnham Yard to North Yard in 1949, the antecedents peculiar to its performance at Denver Terminal, attached to it in the same way it had ever since 1919; the locale of its performance would not alter nor affect application of the rules.

Next, note that the statements of the carrier to the effect that the men did not protest the nature of the bulletin prior to its posting, are followed by the reason why no exceptions were taken to the requirement that the train crews handle the engine to the tie up track. It is said:

> "* * * The bulletin did not specifically say brakemen would handle road engines on inbound trains to tie-up track at the North Yard but did state tie-up track would be designated * * *".

Naturally, it was assumed that when the work was being transferred from Burnham Yard to North Yard in circumstances where it had long been recognized that it was in violation of Article 9(b) to require road train crews to handle their engine to the tie up track, that the picture was not to be changed without negotiation and agreement; that assumption would be strengthened, not weakened, by covering the subject in bulletin 151 when it was posted, August 15, 1949, without mentioning or implying that the work was to be shifted to the train crews. Other evidence in the record shows that the carrier did not exact the service of the train crews after Circular #425 was posted, August 24, 1949, and then did so initially by verbal instructions. The violations were discontinued January 17, 1950, by the posting of Circular #36 and Circular #53, whereby the switch handling involved was to be done by switchtenders.

As indicated, the men filed claims for performing the work during the period the instructions were in effect, con-

tending that prior settlements, particularly First Division Award No. 9357, supported them.

The carrier denied the claims and they were submitted to the First Division, Docket No. 26570. The case was withdrawn and presented to the Special Board on the property. The agreement establishing the Special Board, gave its decisions the same effect as Awards of the First Division under the Railway Labor Act. That is, the particular decision would be final and binding on the parties as to that particular dispute, or claim. (Paragraph J). The Board's authority was limited by Paragraph H:

> "The Board * * * shall not have authority to change existing agreements governing rates of pay, rules and working conditions."

A copy of the decision handed down by Referee Andrew Jackson on the time claims covering the period from August 1949 until the violation was ended by the assignment of switchtenders in January, 1952, is attached to the dissent. The enormity of his miscarriage is apparent to the reader. The employes bitterly protested and Referee Jackson wrote them, giving his reasons for denying the claims:

> "* * * Granted that there were several settlements made on the property which in effect confirmed your construction of Article 9(b). Granted that two awards of the First Division, as well as the recommendations and findings of one Emergency Board, also sustained your position. Notwithstanding these facts, the Carrier finally came to the conclusion that this interpretation was erroneous, after studying the derivation and history and background of Article 9 and has tried to have what in its opinion is the proper interpretation placed upon this article. * * *"

From this it is apparent that his decision was calculated simply to set aside all the evidence in the case for the

purpose of granting to the railroad, "what in its opinion is the proper interpretation" to be placed upon Article 9 from that time forward.

The volume of authority we could cite, to convince the reader that Special Boards and the First Division are without jurisdiction to grant a revision of a schedule rule in the guise of interpreting it; to disregard all the evidence in the case in the process of doing so, would require many additional pages if treated in detail. The proper coure of action for the carrier to have followed was to have negotiated with the employes in an attempt to secure a revision of the agreement; so long as the rule remained in effect and had been interpreted and applied by the parties in the manner shown, it was the function of the Referee to apply it to the claim before him.

Upon receipt of Referee Jackson's decision, the carrier gleefully hastened to abolish the positions of switchtenders and to transfer the work of handling the road engines to the trainmen again.

The employes promptly filed and progressed time claims for each date of the renewed violation, commencing with August 7, 1952, submitting them to the First Division in this Docket, No. 30812.

We have given the substance of the case before us in the above summary. It was upon this record that we refused to follow the errors of Referee Jackson's Special Board decision. We are satisfied that the reader will easily see the soundness of the findings and award made and agree with us that the time claims were valid for the reasons given.

We will now take up the dissent of the Carrier Members and prove lack of basis for each criticism voiced.

The dissent begins by treating the time claims denied by Referee Jackson and those sustained in Award No. 19389 as comprising a single dispute which it is implied, was disposed of by the Special Board. The reasoning em-

ployed is that once a time claim is submitted requiring application of a given rule to a set of facts, a dispute arises and when that dispute is decided, the decision rendered disposes of any future similar or identical case. This is nonsense.

Both, carriers and employes, have brought subsequent similar or identical claims to this Division down through the years, seeking an award overruling an earlier one which is alleged to be erroneous. We have agreed in a substantial number of our awards that this was so and rendered findings and awards overruling previous decisions demonstrated to be erroneous. A few of our more recent awards overruling prior awards are: 16021 overrules 11468; 16461 overrules 16448; 16482 overrules 16408; 17377 overrules 16806; 17780 overrules 12989; 19248 overrules 14477 and 19263 overrules 18039. We have for the same reasons, refused to accept and follow System or Special Board Decisions when presented with evidence of error in their holdings or where we know that they are contrary to the weight of authority here. What better reason for rejecting the decision of Special Board No. 12 in this case, than found in Referee Andrew Jackson's own statements, above quoted? The Carrier Members themselves have resisted application of a Special Board Decision if they thought it erroneous or inconsistent with First Division holdings on the same principle. Some of our latest Awards where we rejected Special or System Board decisions are Nos. 14627, 17330, 17459, 18502, 19150, 19152, 19271, 19272, 19273 and 19274.

If we were to take the dissenter's position on this point at face value, then we nullify Referee Jackson's own award for the reason given by the dissenter in impeaching No. 19389. The record of handling engines at Denver shows a line of settlements between the parties, wherein the carrier repeatedly confessed error on its part and promised to mend its way. These in turn were followed by subsequent violations and resultant time claims until the men

insisted that those filed for the violations perpetrated on and after August 21, 1937, must be paid. The carrier, while conceding the fact of violation, declined the claims as being without schedule support and, in Award No. 9357, the First Division, without Referee, sustained them. Now, if we were to accept the theory advanced in the dissent, that we have here, one DISPUTE comprising time claims submitted in blocks when the carrier is guilty of repeating the violation, then we have First Division Award No. 9357 sustaining identical claims for the performance of the work at the same terminal—Denver—and when the violation was repeated by the carrier during the period from August 1949 to January 17, 1950, the carrier and Referee Jackson should have paid those claims under authority of Award No. 9357 which had already disposed of the "dispute". Instead, the carrier refused to comply with and follow Award No. 9357. Referee Jackson also did so. When the claim covered in Docket No. 30812 was submitted here, the dissenter would not take his own medicine nor was he agreeable to applying the principle he has concocted as a basis for impeaching the soundness of the findings and award rendered by the majority which, in the final analysis, has only done what he himself advocates as just and proper.

The theory of the dissent, that the "dispute" is a broad class case consisting of blocks of time claims submitted from time to time, and that all of them are automatically denied by simply invoking the decision of Special Board No. 12, is dissipated by the simple fact that such "settlement" of the "dispute" was reached by the Division, without Referee assistance, on May 9, 1944, more than 8 years before Referee Jackson jettisoned everything that had gone before, and denied the patently valid claims, because he thought he ought to give the carrier a fresh start, free from its own repeated interpretations of the rules.

Next, the dissenter mentions, with an inuendo of disapproval, that the claims cover full crews. The Petitioner

cited rules from the agreements in his submission, which supported the claim as made and buttressed this with settlements on the property, evidencing understanding between the parties, that the entire crew was entitled to the same payment as a unit. There is no basis for criticism in this regard.

The dissenter cavils at the findings for rejecting Article 15, the Terminal Switching rule, as one "covering work performed at terminals" within the meaning of Article 9(b). It is strange, if this rule meant what is now said of it, that the carrier did not so contend when it was made effective in 1945 instead of first alleging it did when seeking desperately to escape its claim liability in 1952. In many prior cases decided by the First Division, the Carrier Members have alleged that the service of handling road engines by trainmen comes within the beginning and ending of a day rule, not under the terminal switching rule. In award No. 9447, involving these same parties (also see No. 9499) it was held by the Division, with Referee: "* * * moving car or cars from one track to another is construed as switching * * *". Recent Awards Nos. 17816 and 19316 rejected claims based on a contention that similar handling of road engines constituted switching moves. In contrast, awards where the claims were for additional compensation for trainmen required to handle engines in violation of a rule such as Article 9(b), sustained the claims—see Nos. 15393 and 15915. On this very property, (in addition to Awards Nos. 9357 and 19389) we sustained similar claims in Award No. 14631. The distinction between them and cases involving bona fide terminal switching is readily apparent.

A considerable portion of the dissent is devoted to the history of Article 15 and its revisions down through the years, but the rule speaks for itself. It is impossible to read into the present Article 15, anything which will support the proposition that it authorized the carrier to make the handling of road engines at Denver, part of the duties

of the road train crews. The carrier did not act upon any such theory when Article 15 was revised in 1945 nor has it at any time, instructed the men doing the work to claim payment under the terminal switching rule when required to handle their engines in 1949 and again in 1952. It is obvious to the fair-minded reader that this is a make-weight argument, advanced for lack of any other. Furthermore, if the position of the carrier and the dissenter were correct in this respect, then Article 9(b) would have clearly been in mind when the parties negotiated the revision to Article 15 and, if those revisions had the meaning now attributed to them, the parties would have unequivocally agreed to eliminate Article 9(b) from the printed schedule when it was reissued. In short, no action of any kind was taken after revision of Article 15 indicating the slightest thought that it was to have the meaning and application now imputed by the dissenter.

It is impossible to make this portion of the dissent remotely plausible. The reader will surely agree that the practices at terminals within the scope of Article 9(b), which are involved in this award, were in no way affected by Article 15 or its revisions from time to time. It is equally apparent that all of this germinated in the mind of the carrier officer when frantically seeking a basis for declining the valid claims. Repeating these empty assertions and allegations in the dissent cannot give substance to them; shadows they were and shadows they remain.

Nothing in the dissent establishes error in the findings or award. They are unaffected by it.